COMMENTARIES

ON THE

LAWS OF ENGLAND.

VOL. I.

OF THE RIGHTS OF PERSONS.

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COMMENTARIES

ON THE

LAWS OF ENGLAND

In Four Books.

BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS.

A New Edition,

ADAPTED TO THE PRESENT STATE OF THE LAW,

ROBERT MALCOLM KERR, LL.D.

BARRISTER-AT-LAW.

VOL. I.

OF THE RIGHTS OF PERSONS.

LONDON:
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SIR WILLIAM BLACKSTONE'S PREFACE.

THE following sheets contain the substance of a course of lectures on the Laws of England, which were read by the Author in the University of OXFORD. His original plan took its rise in the year 1753; and notwithstanding the novelty of such an attempt in this age and country, and the prejudices usually conceived against any innovations in the established mode of education, he had the satisfaction to find, and he acknowledges it with a mixture of pride and gratitude, that his endeavours were encouraged and patronised by those, both in the University and out of it, whose good opinion and esteem he was principally desirous to obtain.

The death of Mr. VINER in 1756, and his ample benefaction to the University for promoting the study of the law, produced about two years afterwards a regular and public establishment of what the Author had privately undertaken. The knowledge of our laws and constitution was adopted as a liberal science by general academical authority: competent endowments were decreed for the support of a lecturer, and the perpetual encouragement of students; and the compiler of the ensuing Commentaries had the honour to be elected the first Vinerian Professor.

In this situation he was led, both by duty and inclination, to investigate the elements of the law, and the grounds of our civil polity, with greater assiduity and attention than many have thought it necessary to do. And yet all, who of late years have attended the public administration of justice, must be sensible that a masterly acquaintance with the general spirit of laws and

principles of universal jurisprudence, combined with an accurate knowledge of our own municipal constitutions, their original reason, and history, hath given a beauty and energy to many modern judicial decisions, with which our ancestors were wholly unacquainted. If, in the pursuit of these inquiries, the Author hath been able to rectify any errors which either himself or others may have heretofore imbibed, his pains will be sufficiently answered: and if in some points he is still mistaken, the candid and judicious reader will make due allowances for the difficulties of a search so new, so extensive, and so laborious.

Nov. 2, 1765.

POSTSCRIPT.

NOTWITHSTANDING the diffidence expressed in the foregoing Preface, no sooner was the work completed, but many of its positions were vehemently attacked by zealots of all (even opposite) denominations, religious as well as civil; by some with a greater, by others with a less degree of acrimony. To such of these animadverters as have fallen within the Author's notice (for he doubts not but some have escaped it), he owes at least this obligation: that they have occasioned him from time to time to revise his work, in respect to the particulars objected to; to retract or expunge from it what appeared to be really erroneous; to amend or supply it when inaccurate or defective; to illustrate and explain it when obscure. But, where he thought the objections ill-founded, he hath left and shall leave the book to defend itself; being fully of opinion, that if his principles be false and his doctrines unwarrantable, no apology from himself can make them right; if founded in truth and rectitude, no censure from others can make them wrong.

THE EDITOR'S PREFACE.

In the following pages an attempt has been made to adapt the Commentaries of Sir William Blackstone to the present state of the law, by making such alterations in and additions to the text, as seemed to be consistent with the original plan of the work.

Had it been possible to have reprinted the work as it was left by its distinguished Author, and within any reasonable compass of corrective notes to have afforded the reader that introductory and popular view of the existing Laws of England, which it was the object of Sir William Blackstone to supply, that plan would have been adopted. The text has been altered and added to, solely because this course seemed to be the only mode in which the Commentaries could be usefully reproduced in the present day; and it is hoped that the method which has been adopted will meet with the approbation of the reader, when he comes to examine the extent and variety of the alterations which have been made in the law within the last half-century.

No one can appreciate the Commentaries of Sir William Blackstone so thoroughly as the person to whom the duty of editing them has been intrusted. The trouble and anxiety involved in the performance of that duty cannot be judged of by a mere perusal of the work; for what may appear to be a

trivial or unimportant emendation, may possibly have occasioned much labour and considerable thought. The Editor ventures, therefore, to claim some consideration for the difficulty of his task, and some indulgence for those defects in its execution, which he cannot but feel must exist.

Whenever the Editor has, in any instance, ventured to alter or add to the text of Sir William Blackstone, he has given his authority for so doing.[a] This reference has often been made in the text itself, by a mention of the statute which has effected the change in the law; more frequently, however, his authority has been stated in a note.[b] The alterations which have been made in the text, and those portions of the work for which the present Editor is responsible, have, with few exceptions, been put within inverted commas, in order that the reader may be able at once to distinguish these alterations or additions from the original text. The few exceptions, which have not been pointed out in this way, comprise those words which in the original text of Sir William Blackstone were in the *present*, but in the present edition are in the *past* tense; many pages, and indeed chapters, of the Commentaries, having become purely historical.[c] Those portions of the Commentaries which have become entirely obsolete, but are still curious or interesting either in a historical point of view or with reference to the altered state of the law, have been converted into *notes*, reference being made at the same time to the page of the original work. Those notes, for which

[a] The Editor's references may be easily distinguished from those of the original work. Sir William Blackstone referred to the decisions of the Courts by mentioning the volume and page of the reporter merely, thus:—"1 Burr. 526" (see vol. I. p. 56). The present Editor has used the modern method of quotation, thus: "*Jewison* v. *Dyson*, 9 M. & W. 540"

[b] The Editor has on several occasions substituted for Wilkins' Latin translation of our Early Statutes, what may be called the authorized version, published by the Record Commission. He has also ventured to *substitute* for the references to Wilkins' *Leges Anglo-saxonicæ* (fol. 1712), references to "The Ancient Laws and Institutes of England, published under the direction of the Record Commissioners," 8vo, 1840, and ably edited by Benjamin Thorpe, Esq.

[c] The Editor has also mentioned, on the margin, the *pages* of the original work. These pages are placed within brackets, thus: [346].

the Editor is himself responsible, have been put within inverted commas, in the same way as his additions to the text.

What success may have attended his efforts it is impossible for the Editor to judge. He can only pledge himself that no trouble or labour has been wanting on his part, to fulfil properly the responsible duty which he has undertaken. He has enjoyed the advantage, in many instances, of the advice and assistance of some of his professional friends, whose kindness he feels called upon thus publicly to acknowledge.

TEMPLE,
March 1857.

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INTRODUCTION.

SECTION I.

ON THE STUDY OF THE LAW.[a]

THE science of the laws and constitution of our own country is a species of knowledge, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the civil or imperial law, under different modifications, is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern part of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science, which is to be the guardian of his natural rights, and the rule of his civil conduct. [4]

Nor have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion formerly prevailed, to transport the growing hopes of this island to foreign [5]

[a] This dissertation was read as an inaugural address, at the opening of the first course of Vinerian lectures in Oxford, on 25th Oct. 1758. Being now treated as a general essay on the Study of the Law, a few prefatory remarks, addressed by the learned commentator to the vice-chancellor and gentlemen of the university, have been omitted here, and at page 19, *post*.

universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their own municipal law. In the meantime it has been the peculiar lot of our admirable system of laws to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages.

Far be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. No man is more thoroughly persuaded of the general excellence of its rules, and the usual equity of its decisions, nor is better convinced of its use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the prætor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

Without detracting, therefore, from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowledge of the laws of that society in which we live, is the proper accomplishment of
[6] every gentleman and scholar; a highly useful, I had almost said essential, part of a liberal and polite education. And in this I am warranted by the example of ancient Rome, where, as Cicero informs us,[b] the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium*, or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country.

But as the long and universal neglect of this study with us in England, seems in some degree to call in question the

[b] De Leg. 2. 23.

truth of this evident position, it shall therefore be the business of this introductory discourse to demonstrate the utility of some general acquaintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life.

Utility of a knowledge of the Law,

And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution.[c] This liberty, rightly understood, consists in the power of doing whatever the laws permit;[d] which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those, at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither [7] time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public; and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

to gentlemen of fortune,

Let us, therefore, begin with our gentlemen of independent estates and fortune, the most useful, as well as considerable, body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Locke[e] as a strange absurdity. It is their landed property, with its long and

[c] Montesq. Esp. L. l. 11, c. 5.

[d] *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* Inst. l. 3, 1.

[e] Education, § 187.

voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is, perhaps, too laborious a task for any but a lawyer by profession; yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious impositions.

to Testators, Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and certain requisites with regard to their attestation. An ignorance in these must always be of dangerous consequence to such as, by choice or necessity, compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distress that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all; so
[8] that in the end, his estate may often be vested quite contrary to these his enigmatical intentions, because, perhaps, he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has not executed his will in the presence of two witnesses as the law now requires.

to Jurors, But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety, has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

But it is not as a juror only, that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is open for a gentleman to exert his talents by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences, and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also (under which must be included the knowledge) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, [9] or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

to Justice of the Peace,

Yet farther: most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament; and those who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may enjoy a few peculiar privileges; that they may list under party banners; may grant or withhold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law when he is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

to Members of Parliament,

Indeed, it is perfectly amazing that there should be no other state of life, no other occupation, art, or science, in

which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior
[10] fortune thinks himself born a legislator. Yet Cicero was of a different opinion: "It is necessary (says he[f]) for a senator to be thoroughly acquainted with the constitution; and this (he declares) is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection; without which no senator can possibly be fit for his office."

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question: and how far they have been owing to the defective education of our senators, is a point well worthy of public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and inexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity changed for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other courts of justice), owe their origin not to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen (as Sir Edward Coke expresses it[g]) with provisoes and additions, and many times on a sudden penned or corrected by men of none, or very little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if," he subjoins, "acts of parliament were after the old fashion penned, by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far former statutes had provided remedy for former mischiefs,

[f] De Leg. 3, 18.

[g] 2 Rep. pref.

and defects discovered by experience; then should very few questions in law arise, and the learned should not so often [11] and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisos, as they now do." And if this inconvenience was so heavily felt in the reign of Queen Elizabeth, how much must the evil have increased in later times, when the statute-book is swelled to so much larger bulk; unless it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

What is said of our gentlemen in general, and the pro- to the Nobility, priety of their application to the study of the laws of their country, will hold equally strong, or still stronger, with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers.[h]

[h] Sir William Blackstone here adds, "and arbiters of the property of all their fellow-subjects, and that on the last resort. In this their judicial capacity (the learned commentator continues) they are bound to decide the nicest and most critical points of the law: to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts of Westminster. Their sentence (the sentence of the House of Lords in its judicial capacity) is final, decisive, irrevocable; no appeal, no correction, not even a review can be had; and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

"Should a judge in the most subordinate jurisdiction be deficient in the knowledge of the law, it would reflect infinite contempt upon himself, and disgrace upon those who employ him, and yet the consequence of his ignorance is comparatively very trifling and small: his judgment may be examined, and his errors rectified, by other courts. But, how much more serious and affecting is the case of a superior judge, if without any skill in the laws he will boldly venture to 12. decide a question upon which the welfare and subsistence of whole families may depend! where the chance of his judging right or wrong is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress.

"Yet, vast as this trust is, it can no where be so properly reposed, as in the noble hands where our excellent constitution has placed it; and therefore placed it, because, from the independence of their fortune and the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowledge of the laws than persons of inferior rank; and because the founders of our polity relied upon that delicacy of sentiment so peculiar to noble birth; which, as on

[12] The Roman Pandects will furnish us with a piece of history not inapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scævola, the then oracle of the Roman law; but, for want of some knowledge in that science, could not so much as understand even the technical terms, which his friend was obliged to make use of. Upon which, Mutius Scævola could not forbear to upbraid him with this memorable reproof, "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law;
[13] wherein he arrived to that proficiency, that he left behind him about a hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero, a much more complete lawyer than even Mutius Scævola himself.

I would not be thought to recommend to our English nobility and gentry to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise, indefatigable senator; but the inference which arises from the story is this, that ignorance of the laws of the land has ever been esteemed dishonourable in those who are intrusted by their country to maintain, to administer, and to amend them.

to the Clergy. Nor will some degree of legal knowledge be found in the least superfluous to persons of inferior rank; especially those of the learned professions. The clergy, in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered

one hand it will prevent either interest or affection from interfering in questions of right; so on the other it will bind a peer in honour, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birthright to decide."

But for many years the peers have not personally interfered in those matters which have come before them judicially; and the appellate jurisdiction of the House of Lords has been exercised exclusively by the lord chancellor and such other peers as have held high judicial office. (See vol. iii. p. 64.) *O'Connell* v. *The Queen*, 11 Cl. & Fin. 155.

merely as clergymen, to be acquainted with many branches [14] of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes, and other ecclesiastical dues; to marriages (more especially of late), and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired than by use, and a familiar acquaintance with legal writers.

For the gentlemen of the faculty of physic, I must frankly **to Physicians,** own that I see no special reason why they in particular should apply themselves to the study of the law, unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave, however, to suggest, and that not ludicrously, that it might frequently be of use to families, upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution.

But those gentlemen who intend to profess the civil and **and to Civilians.** ecclesiastical laws, in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom: they are no more binding in England, than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption. In which we are not singular in our notions; for, even in [15] Holland, where the imperial law is much cultivated, and its decisions pretty generally followed, we are informed by Van

Leeuwen,[i] that "it receives its force from custom, and the consent of the people, either tacitly or expressly given: for otherwise (he adds) we should no more be bound by this law, than by that of the Almains, the Franks, the Saxons, the Goths, the Vandals, and other of the ancient nations." Wherefore, in all points in which the different systems depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical. And, in those of our English Courts, wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law in either instance, both may, and frequently does, prohibit and annul their proceedings;[j] and it will not be a sufficient excuse for them to tell the courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota, or imperial chamber.

For which reason it becomes highly necessary for every civilian and canonist, who would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases, and how far, the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together, as to form certain supplemental parts of the common law of England, distinguished by the titles of the mari-
[16] time, the military, and the ecclesiastical law.

Causes of the neglect of the study of the Law.

Such being the general use and necessity of some acquaintance with the common law, I shall now proceed to inquire why the study of it has fallen into disuse.

Sir John Fortescue, in his panegyric on the laws of England (which was written in the reign of Henry the Sixth), puts a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning: "why the laws of England, being so good, so fruitful, and so commodious, are not taught in the univer-

[i] *Dedicatio Corporis Juris Civilis.*

[j] Hale Hist. C. L. c. 2. Selden in Fletam. 5 Rep. *Caudrey's* case. 2 Inst. 599.

sities, as the civil and canon laws are?" In answer to which he gives what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being, in short, that "as the proceedings at common law were in his time carried on in three different tongues, the English, the Latin, and the French, that science must be necessarily taught in those three several languages; but that in the universities, all sciences were taught in the Latin tongue only;" and therefore he concludes, "that they could not be conveniently taught or studied in our universities." But, without attempting to examine seriously the validity of this reason (the very shadow of which has long been entirely taken away), we perhaps may find out a better, or at least a more plausible account, why the study of the municipal laws has been so long neglected in these seats of science, than what the learned chancellor thought it prudent to give to his royal pupil.

That ancient collection of unwritten maxims and customs, [17]
which is called the common law, however compounded, or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest. This had endeared it to the people in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages; it was then taught, says Selden,[k] in the monasteries, *in the universities*, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the British Druids) they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmesbury.[l] The judges therefore were usually created out of the sacred order,[m] as was likewise the case among the Normans;[n] and all the

[k] In Fletam 7, 7.

[l] De Gest. Reg. l. 4.

[m] Dugdale Orig. jurid. c. 8.

[n] *Les juges sont sages personnes et autentiques,—sicome les archevesques, evesques, les chanoines des eglises cathedraulx, et les autres personnes qui ont dignitez in sainctes eglises; les abbez, les prieurs conventaulx, et les gouverneurs des eglises, &c.* Grand Coustumier, ch. 9.

inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day.

But the common law of England, being not committed to writing, but only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy, who came over hither in shoals during the reign of the Conqueror and his two sons, and were utter strangers to our constitution as well as our language. 'It was about this time that the study of the civil law, after an extinction of six centuries, was revived over the whole continent of Europe,
[18] and it soon' became in a particular manner the favourite of the popish clergy, who borrowed therefrom the method and many of the maxims of the canon law. The study of it was introduced into several universities abroad, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science; and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peacable forms of government, adopted the civil law (being the best-written system then extant), as the basis of their several constitutions; blending and interweaving it among their own feudal customs, in some places with a more extensive, in others a more confined authority.[o]

Study of the Civil Law by the clergy.

Nor was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury (A.D. 1138), and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest Vacarius, whom he placed in the university of Oxford, to teach it to the people of this country.[p] But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and though the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitution, and had already severely

[o] Domat's Treatise of Laws, c. 13, § 9. Epistol. Innocent IV. in M. Paris A.D. 1254.

[p] Gervas. Dorobern. Act. Pontif. Cantuar. col. 1665. See an account of the teaching and works of Vacarius in Dr. Irving's Introd. to the Study of the Civil Law. London, 1837.

felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen also published a proclamation,[q] forbidding the study of the laws, [19] then newly imported from Italy, which was treated by the monks[r] as a piece of impiety, and though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.

From this time the nation seems to have been divided into two parties; the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law, both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the opposite system that real merit which is abundantly to be found in each. This appears, on the one hand, from the spleen with which the monastic writers[s] speak of our municipal laws upon all occasions; and on the other, from the firm temper which the nobility showed at the famous parliament of Merton, when the prelates endeavoured to procure an act, to declare all bastards legitimate, in case the parents intermarried at any time afterwards, alleging this only reason, that holy church (that is, the canon law) declared such children legitimate; but "all the earls and barons (says the parliament roll[t]) with one voice answered, that they would not change the laws of England which had hitherto been used and approved." And we find the same jealousy prevailing above a century afterwards,[u] when the nobility declared with a kind of prophetic spirit, "that the realm of England hath never been unto this hour, neither by the consent of our lord the king and the lords of parliament, shall it ever be, ruled or governed by the civil law."[v] And of this temper between the [20] clergy and laity many more instances might be given.

[q] Rog. Bacon, citat. per Selden in Fletam. 7, 6; in Fortesc. c. 33, and 8 Rep. Pref.

[r] Joan. Sarisburiens. Polycrat. 8, 22.

[s] Joan. Sarisburiens. Polycrat. 5, 16. Polydor. Virg. Hist. l. 9.

[t] Stat. Merton. 20 Hen. III. c. 9. *Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.*

[u] 11 Rich. II.

[v] Selden. Jan. Anglor. l. 2, § 43, in Fortesc. c. 33.

Withdrawal of the clergy from the practice of the Common Law.

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of King Henry the Third, episcopal constitutions were published,[w] forbidding all ecclesiastics to appear as advocates *in foro sæculari;* nor did they long continue to act as judges there, not caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm;[x] though they still kept possession of the high office of chancellor; an office then of little juridical power; and afterwards, as its business increased by degrees, they modelled the process of the court at their own discretion.

But wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our universities, and from the high court of chancery before mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; Pope Innocent the Fourth having forbidden[y] the very reading of it by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered, that our universities began about that period to receive their present form of scholastic discipline; that they were then, and con-
[21] tinued to be till the time of the Reformation, entirely under the influence of the popish clergy (Sir John Mason, the first protestant, being also the first lay chancellor of Oxford); this will lead us to perceive the reason why the study of the Roman laws was in those days of bigotry[z] pursued with such

[w] Spelman. Concil. A.D. 1217. Wilkins' Councils, vol. 1, p. 574, 599.

[x] Selden in Fletam, 9, 3.

[y] M. Paris A.D. 1254.

[z] There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character even of the blessed

alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

And, since the Reformation, many causes have conspired to prevent its becoming a part of academical education. As, first, long usage and established custom; which, as in everything else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation; and the ignorance of the merit of the common law, though its equal at least, and perhaps an improvement on the other. But the principal reason of all that has hindered the introduction of this branch of learning is, that the study of the common law, being banished from the universities in the times of popery, has fallen into quite a different channel, and has hitherto been wholly cultivated in another place.

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen: who entertained upon their parts a most hearty aversion to the civil law,[a] and made no scruple to profess their contempt, nay even their ignorance[b] of it, in the most public manner. But still as the balance of [22]

virgin, without making her a civilian and a canonist; which Albertus Magnus, the renowned Dominican doctor of the thirteenth century, thus proves in his Summa de laudibus christiferæ virginis (divinum magis quam humanum opus) qu. 23, §. 5. "*Item quod jura civilia, et leges, et decreta scivit in summo, probatur hoc modo; sapientia advocati manifestatur in tribus; unum, quod obtineat omnia contra judicem justum et sapientem; secundo, quod contra adversarium astutum et sagacem; tertio, quod in causa desperata: sed beatissima virgo, contra judicem sapientissimum, Dominum; contra adversarium callidissimum, dyabolum; in causa nostra desperata; sententiam optatam obtinuit.*" To which an eminent Franciscan, two centuries afterwards, Bernardinus de Busti (Mariale, part 4. serm. 9), very gravely subjoins this note: "*Nec videtur incongruum mulieres habere peritiam juris. Legitur enim de uxore Joannis Andreæ glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit.*"

[a] Fortesc. de laud. LL. c. 23.

[b] This remarkably appeared in the case of the abbot of Torun, M. 22 Edw. III. 24, who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory *contra inhibitionem novi operis;* by which words Selden (in Flet. 8, 5) very justly understands to be meant the title *de novi operis nuntiatione* both in the civil and canon laws (Ff. 39, 1, C. 8, 11, and Decretal. not Extrav. 5, 32), whereby the erection of any new buildings in prejudice of more ancient ones was prohibited. But Skipwith, the king's serjeant, and afterwards chief baron of the exchequer, declares them to be flat nonsense: "*in ceux parolx*, contra inhibitionem novi operis *ny ad pas entend-*

learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta), had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

Establishment of the Court of Common Pleas at Westminster.

The incident which I mean was the fixing the court of Common Pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held before the king's capital justiciary of England, in [23] the *aula regis*, or such of his palaces wherein his royal person resided; and removed with his household from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, boththat of King John and King Henry the Third, that "common pleas should no longer follow the king's court, but be held in some certain place:" in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who (as Spelman[c] observes), addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science, for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, King Edward the First.

In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order; and, being excluded from

ment:" and Justice Schardelow mends the matter but little by informing him, that they signify a restitution *in their law:* for which reason he very sagely resolves to pay no sort of regard to them, "*Ceo n'est que un restitution en leur ley, pur que a ceo n'avomus regard,*" &c.

[c] Glossar. 334.

Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the Inns of Court and of Chancery) between the city of Westminster, the place of holding the king's courts, and the city of London, for advantage of ready access to the one, and plenty of provisions in the other.[d] Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil.[e] The degrees were those of barristers (first styled apprentices[f] from *apprendre*, to learn), who answered to our bachelors: as the state and degree of a serjeant,[g] *servientis ad legem*, did to that of doctor. [24]

Origin of the Inns of Court.

The Crown seems to have soon taken under its protection this infant seminary of common law; and the more effectually to foster and cherish it, King Henry the Third, in the nineteenth year of his reign, issued out an order directed to the mayor and sheriffs of London, commanding that no regent of any law schools *within* that city should for the future teach law therein.[h] The word law, or *leges*, being a general term, may create some doubt at this distance of time, whether the teaching of the civil law, or the common, or both, is hereby restrained. But in either case, it tends to the same end. If the civil law only is prohibited (which is Selden's[i] opinion),

[d] Fortesc. c. 48.

[e] See Herbert's Account of the Inns of Court and Chancery, London, 1804.

[f] Apprentices or barristers seem to have been first appointed by an ordinance of King Edward the First in Parliament, in the 20th year of his reign. (Spelm. Gloss. 37; Dugdale, Orig. Jurid. 55.)

[g] The first mention I have met with in our law books of serjeants, or countors, is in the statute of Westm. 1, 3 Edw. I. c. 29, and in Horn's Mirror, c. 1, § 10; c. 2, § 5; c. 3, § 1, in the same reign. But M. Paris, in his Life of John II. abbot of St. Alban's, which he wrote in 1255, 39 Hen. III., speaks of advocates at the common law, or countors (*quos banci narratores vulgariter appellamus*), as of an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, A.D. 1259, in the case of one William de Bussy, who being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end *voluit ligamenta coifae suae solvere ut palam monstraret se tonsuram habere clericalem; sed non est permissus. -Satelles vero eum arripiens, non per coifae ligaminâ sed per guttur eum apprehendens, traxit ad carcerem.* And hence Sir H. Spelman conjectures (Glossar. 335), that coifs were introduced to hide the tonsure of such renegade clerks, as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon. (See also Mr. Serjeant Manning's *Serviens ad Legem*. London, 1840.)

[h] *Ne aliquis scholas regens de legibus in eadem civitate de caetero ibidem leges doceat.*

[i] In Flet. 8, 2.

it is then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law be also included in the restriction (as Sir Edward Coke[j] understands it, and which the words seem to import), then the intention is evidently this: by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university, which was newly instituted in the suburbs.

[25] In this juridical university (for such it is insisted to have been by Fortescue[k] and Sir Edward Coke[l]) there were two sorts of collegiate houses; one called inns of *chancery*, in which the younger students of the law were usually placed, "learning and studying," says Fortescue,[m] "the originals, and as it were the elements of the law; who, profiting therein as they grew to ripeness, so were they admitted into the *greater* inns of the same study, called the *inns* of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by its practice: and that in his time there were about two thousand students at the several inns, all of whom, he informs us, were *filii nobilium*, or gentlemen born.

Hence it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the Sixth it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be instructed in the origin and elements of the laws. But by degrees this custom fell into disuse; so that, in the reign of Queen Elizabeth, Sir Edward Coke[n] did not reckon above a thousand students; 'and the number two centuries later was very considerably less. This was then attributed principally' to these reasons: first, because the inns of chancery being then almost totally filled by the inferior branch of the profession, were neither commodious nor proper for the resort of gentlemen of any rank or figure; so that there were very rarely any young students entered at the inns of chancery;

[j] 2 Inst. proem.
[k] C. 49.
[l] 3 Rep. pref.
[m] C. 49.
[n] 3 Rep. pref.

secondly, because in the inns of court all sorts of regimen and academical superintendence, either with regard to morals or studies, were found impracticable, and therefore entirely neglected; lastly, because persons of birth and fortune, after having finished their usual courses at the universities, had seldom leisure or resolution sufficient to enter upon a new [26] scheme of study at a new place of instruction. Few gentlemen now resort to the Inns of Court, but such as are intended for the profession: the rest of our gentry (not to say our nobility also) have usually retired to their estates, or visited foreign kingdoms, or entered upon public life, without any instruction in the laws of the land, and indeed with hardly any opportunity of gaining instruction, unless it has been afforded them at the universities.

On the study of the Law in the Universities.

That the universities are the proper places for affording assistance of this kind to gentlemen of all stations and degrees, cannot (I think) with any colour of reason be denied. And the advantages that might result to the science of the [30] law itself, when a little more attended to in these seats of knowledge, would perhaps be very considerable. The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads, for improving its method, retrenching its superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system; a task which those who are deeply employed in business and the more active scenes of the profession, can hardly condescend to engage in. And as to the interest, or (which is the same) the reputation of the universities themselves, I may venture to pronounce, that if ever this study should arrive to any tolerable perfection there, the nobility and gentry of this kingdom would not shorten their residence upon this account, nor perhaps entertain a worse opinion of the benefits of academical education.

For I think it past dispute that those gentlemen, who [31] resort to the Inns of Court with a view to pursue the profession, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other science, in one of our learned universities. We may appeal to the experience of every sensible lawyer, whether any-

thing can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and inexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest. In this situation he is expected to sequester himself from the world, and by a tedious study to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little therefore is it to be wondered at that we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a pursuit, and addict themselves wholly to amusements, or other less innocent occupations; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives!

The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely
[32] pernicious consequence. I mean the custom by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law: and placing them, in its stead, at the desk of some skilful attorney; in order to initiate them early in all the depths of practice, and render them more dexterous in the mechanical part of business. A few instances of particular persons (men of excellent learning and unblemished integrity), who, in spite of this method of education, have shone in the foremost ranks of the bar, have afforded some kind of sanction to this illiberal path to the profession, and biassed many parents of short-sighted judgment, in its favour: not considering that there are some geniuses, formed to overcome all disadvantages, and that from such particular instances no general rules can be formed; nor observing, that those very persons have frequently recommended, by the most forcible of all examples, the disposal of their own offspring, a very different foundation of legal studies, a regular academical education.

Education for the Bar.

Making therefore due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer

thus educated to the bar, in subservience to attornies and solicitors,[o] will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be misinstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him; *ita lex scripta est*[p] is the utmost his knowledge will arrive at: he must never aspire to form, and seldom expect to comprehend, any arguments drawn *à priori*, from the spirit of the laws, and the natural foundations of justice.

[33] Nor is this all; for (as few persons of birth or fortune, or even of scholastic education, will submit to the drudgery of servitude, and the manual labour of copying the trash of an office), should this infatuation prevail to any considerable degree, we must rarely expect to see a gentleman of distinction or learning at the bar. And what the consequence may be, to have the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure or illiterate men, is matter of very public concern.

The inconveniences here pointed out can never be effectually prevented, but by making academical education a previous step to the profession of the common law, and at the same time making the rudiments of the law a part of academical education. For sciences are of a sociable disposition, and flourish best in the neighbourhood of each other; nor is there any branch of learning but may be helped and improved by assistances drawn from other arts. If, therefore, the student in our laws has formed both his sentiment and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of

[o] See Kennet's Life of Somner, p. 67.

[p] Ff. 40, 9, 12.

the several branches of genuine experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it (though all may be easily done under as able instructors as ever graced any seats of learning), a student thus qualified may enter upon the study of the law with incredible advantage and reputation. And if, at the conclusion, or during the acquisition of these
[34] accomplishments, he will afford himself here a year or two's farther leisure, to lay the foundation of his future labours in a solid scientific method, without thirsting too early to attain that practice which it was impossible he should rightly comprehend, he will afterwards proceed with the greatest ease, and will unfold the most intricate points with an intuitive rapidity and clearness.

I shall not insist upon such motives as might be drawn from principles of economy, and are applicable to particulars only: I reason upon more general topics. And therefore to the qualities of the head, which I have just enumerated, I cannot but add those of the heart; affectionate loyalty to the sovereign, a zeal for liberty and the constitution, a sense of real honour, and well-grounded principles of religion; as necessary to form a truly valuable English lawyer, a Hyde, a Hale, or a Talbot.

Plan of the Commentaries.

'In the following Commentaries on the Laws of England, I have endeavoured to accomplish rather what' I conceive an expounder of the laws *should* do, than what I have ever known
[35] to be done. He should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities; it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged, like that of the readers in Fortescue's inns of chancery, "in tracing out the originals, and, as it were, the elements of the law." For if, as Justinian[q] has observed, the tender understanding of the student be loaded at the first with a multitude and

[q] Inst. l. 1, 2.

variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay, and despondence. These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Cæsar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes; to the rules of the Roman law either left here in the days of Papinian, or imported by Vacarius and his followers: but above all, to that inexhaustible reservoir of legal anti- [36] quities and learning, the feudal law, or, as Spelman[r] has entitled it, the law of nations in our western orb. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons; illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shown how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.

A plan of this nature, if executed with care and ability, cannot fail of administering a most useful and rational entertainment to students of all ranks and professions; and yet it must be confessed that the study of the laws is not merely a matter of amusement; for, as a very judicious writer[s] has observed upon a similar occasion, the learner "will be considerably disappointed, if he looks for entertainment without the expense of attention;" an attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favourite recreation or exercise. And this attention is not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtile distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of Sir John Fortescue, when first his royal pupil determines

[r] Of Parliaments, 57.

[s] Dr. Taylor's Elem. of Civil Law.

to engage in this study:—"It will not be necessary for a gentleman, as such, to examine with a close application the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if under the instruction of a master he traces up the principles and
[37] grounds of the law, even to their original elements. Therefore in a very short period, and with very little labour, he may be sufficiently informed in the laws of his country, if he will but apply his mind in good earnest to receive and apprehend them. For though such knowledge as is necessary for a judge is hardly to be acquired by the lucubrations of twenty years, yet with a genius of tolerable perspicacity, that knowledge which is fit for a person of birth or condition, may be learned in a single year, without neglecting his other improvements."

'To such gentlemen, again, as intend to pursue the profession, a much longer period of preparation is requisite. Admission to an inn of court, and the keeping of terms and attendance at some of the lectures delivered in each of the halls of these ancient societies, constitute the formal proceedings necessary to enable the student to be called to the bar. That he may be able to undertake and perform worthily the duties of a barrister, when he has achieved that honourable degree, the student cannot now do better than follow out what has for many years been the almost universal practice. He should become a pupil in the chambers of a practising barrister of reputation, where he may see and learn, in actual practice, the business of his intended profession. His tutor will direct his studies and explain to him how to search out, and what is of more importance, how to apply the rules and principles of the law to the cases that are brought before him. This instruction, with diligent study of the works of the principal legal authors, and of the Reports of the Cases argued and determined in the different courts, will assuredly enable the student to appear in Court, when he is called upon to do so, with credit to himself, and satisfaction to those clients with whose interests he is intrusted.'

SECTION II.

ON THE NATURE OF LAWS IN GENERAL.

LAW, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey. [38]

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes, at his own pleasure, certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law, as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws; more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again;—the method of animal nutrition, digestion, secretion, and all other branches of vital economy;—are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary [39] manner, and guided by unerring rules laid down by the great Creator.

This, then, is the general signification of law, a rule of action dictated by some superior being; and in those creatures that have neither the power to think nor to will, such laws must

be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free-will, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct; not indeed in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less absolute or limited. And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will.

Law of nature. This will of his Maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby [40] that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the Creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the

conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian[a] has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance, its inseparable companion. As, therefore, the Creator is a being, not only of infinite *power* and *wisdom*, but also of infinite *goodness*, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former: and if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connexion of justice and human felicity, he has not perplexed the law of nature with a multitude of abstract rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously [41] reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if con-

[a] *Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.* (Inst. I. 1. 3.)

trary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this origin.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason: whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life; by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

The revealed law of God.

This has given manifold occasion for the benign interposition of Divine Providence; which, in compassion to the [42] frailty, the imperfection, and the blindness of human reason, has been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same origin with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law. Because one is the law of nature expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority: but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligation *in foro conscientiæ* to abstain from its perpetration. [43] Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries (which was at one time prohibited by statute); here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

Law of Nations.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any superior but Him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject,[b] is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of

[b] Puffendorff, l. 7, c. 1, compared with Barbeyrac's Commentary.

law to regulate this mutual intercourse, called "the law of nations;" which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts, we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject, and therefore the civil law[c] very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

[44] Municipal law.

Thus much I thought necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian,[d] "*jus civile est quod quisque sibi populus constituit.*" I call it *municipal* law, in compliance with common speech; for though, strictly, that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." Let us endeavour to explain its several properties, as they arise out of this definition.

Municipal law is a *rule*

And, first, it is a *rule:* not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a *rule.*

[c] Ff. 1, 1, 9. [d] Inst. 1, 2, 1.

It is also called a *rule*, to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation*, but upon the *maker's will*. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also. It is also called a *rule*, to distinguish it from [45] a *compact* or *agreement*, for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "Thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the origin of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be "*a rule*."

"of civil conduct"

Municipal law is also "a rule *of civil conduct*." This distinguishes municipal law from the natural or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more, than that he do contribute, on his part, to the subsistence and peace of the society.

"prescribed"

It is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great difference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, *vivâ voce*, by

[46] officers appointed for that purpose, as used to be done with regard to proclamations, and such acts of parliament as were appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.[e] All laws should be therefore made to commence *in futuro,* and be notified before their commencement;[f] which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.[g]

"by the supreme power."

But, farther: municipal law is "a rule of civil conduct prescribed *by the supreme power in a state.*" For legislation, as was before observed, is the greatest act of superiority that can be exercised by one being over another, Wherefore it is requisite to the very essence of a law, that it be made by the

[e] Such laws among the Romans were denominated *privilegia,* or private laws, of which Cicero (de leg. 3, 19, and in his oration pro domo, 17) thus speaks: "*Vetant leges sacratæ, vetant duodecim tabulæ, leges privatis hominibus irrogari; id enim est privilegium. Nemo unquam tulit: nihil est crudelius, nihil perniciosius, nihil quod minus hæc civitas ferre possit.*"

[f] The maxim of the law of England is, *Nova constitutio futuris non preteritis imponere debet.* (*Moon* v. *Durden,* 2 Ex. Rep. 22.)

[g] Acts of parliament, in which no specific day is fixed for their commencement, take effect from the day on which they receive the royal assent. (33 Geo. III. c. 13.)

supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

This may lead us into a short inquiry concerning the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of a state, (wherever that sovereignty be lodged,) of making and enforcing laws. [47]

Origin of society.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society, either natural or civil; but that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted; and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society, among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together, that demonstrates the necessity of this union, and that, therefore, is the solid and natural foundation, as well as the cement, of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in

[48] the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all, it was impossible that protection could be certainly extended to any.

Origin and object of government.

For when civil society is once formed, government at the same time results, of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be intrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one-half of those mischiefs which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the Supreme Being; the three grand requisites, I mean, of wisdom, of goodness, and of power: wisdom to discern the real interest of the community; goodness to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well-constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began,
[49] or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summa imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of

such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly, consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is intrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to these three. Three forms of government.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is, indeed, the most powerful of any; for by the entire conjunction of the legislative and executive powers, all the sinews of government are knit together, and united in the hand of the prince; but then there is imminent danger of his employing that strength to improvident or oppressive purposes. 1. Democracy. [50] 2. Aristocracy. 3. Monarchy.

Thus these three species of governments have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of the law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero[h] declares himself of opinion, "*esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, sit modicè confusa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.[i]

Theory of the British constitution.

But happily, for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the law is lodged in a single person, they have all the advantages of strength and despatch that are to be found in the most absolute monarchy: and as the legislature of the kingdom is intrusted to three distinct powers, entirely independent of each other; first, the crown; secondly, the lords spiritual and temporal, which is an aristocratic assembly of persons selected for their piety, their birth,
[51] their wisdom, their valour, or their property; and thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of everything; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily

[h] In his fragments De Rep. l. 1, c. 29 and c. 45.

[i] Tacit. Ann. l. 4, c. 33.

united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches: for instance, in the crown and house of lords, our laws might be providently made, and well executed, but they might not have always the good of the people in view: if lodged in the sovereign and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the crown had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. The legislature would be changed [52] from that, which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected, is according to Locke[j] (who perhaps carries his theory too far) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy; with liberty to constitute to themselves a new legislative power.[k]

[j] On Government, part 2, § 212.

[k] The reader need scarcely be told that this panegyric on the British constitution can only apply to it as it has existed since the Revolution. Mr. Hallam has laboured to show, and, perhaps, succeeded in showing, that parliament, even in the days of the Plantagenets, created sufficient safeguards for public liberty, as it was then understood. But the subserviency of the legislature to Henry VIII. and Queen Elizabeth is not to be disputed; and the prerogative of Charles I. was admittedly much more extensive than that now possessed by the Crown. From the Revolution again till the passing of the Reform Bill the House of Lords

The right of the supreme power to legislate.

Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is intrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law.*

Thus far as to the *right* of the supreme power to make laws; but farther, it is its *duty* likewise. For since the respective members are bound to conform themselves to the
[53] will of the state, it is expedient that they receive directions from the state declaratory of that its will. But as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural

had an unquestioned ascendancy; since 1832 the influence of the House of Commons has certainly preponderated; and is gradually, by some considered too rapidly, increasing.

liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

Municipal law commands what is right and prohibits what is wrong.

From what has been advanced, the truth of the former branch of our definition is (I trust) sufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the supreme power in a state.*" I proceed now to the latter branch of it; that it is a rule so prescribed, "*commanding what is right, and prohibiting what is wrong.*"

Now, in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights, and to restrain or redress these wrongs. It remains, therefore, only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

Every law is declaratory, directory, remedial, and vindicatory.

For this purpose every law may be said to consist of several parts: one, *declaratory;* whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another, *directory;* whereby the subject is instructed [54] and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial;* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindicatory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

Declaratory.

With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights, then, which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be

inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great Lawgiver, transcribing and publishing His precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

[55] But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence: yet that right and this offence have no foundation in nature; but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degree they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Directory. Thus much for the *declaratory* part of the municipal law:

and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And as we have seen already, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The *remedial* part of the law is so necessary a consequence **Remedial.** of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain [56] directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested by his death in Titius;" and the *directory* part has "forbidden any one to enter on another's property, without the leave of the owner:" if Gaius, after this, will presume to take possession of the land, the *remedial* part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the *sanction* of laws, or the evil that may **Vindicatory.** attend the breach of public duties, it is observed, that human legislators have for the most part chosen to make the sanction of their laws *vindicatory* rather than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And further, because the dread of evil is a much more forcible principle of human action than the prospect of good.[1] For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, pro-

[1] Locke, Hum. Und. b. 2, c. 21.

pose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are intrusted with the care of putting the laws in execution.

Vindicatory. [57] Of all the parts of a law the most effectual is the *vindicatory*. For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to *compel* and *oblige;* not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty; for rewards, in their nature, can only *persuade* and *allure;* nothing is *compulsory* but punishment.

It is true it has been held, and very justly, by the principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to *rights;* and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties*, and such offences as are *mala in se:* here we are bound in conscience, because we are bound by superior laws, before those human laws were in being, to perform the one, and abstain from the other. But in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without

[58] any intermixture of moral guilt, annexing a penalty to non-

compliance, here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws, for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing, if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this, or submit to such a penalty;" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, 'by one of the game laws, a penalty is denounced against every person that kills a partridge between the first of February and the first of August in every year;' just as by other statutes, now happily repealed, pecuniary penalties were inflicted for exercising trades without serving an apprenticeship thereto, and for not burying the dead in woollen. Now, these prohibitory laws do not make the transgression a moral offence, or sin; the only obligation in conscience is to submit to the penalty, if levied. It must, however, be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence. But, where disobedience to the law involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience.[m]

I have now gone through the definition laid down of a municipal law: and have shown that it is a "rule—of civil conduct—prescribed—by the supreme power in a state—commanding what is right, and prohibiting what is wrong;" [59]
in the explanation of which I have endeavoured to interweave a few useful principles concerning the nature of civil government, and the obligation of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad

Interpretation of laws.

[m] *Lex pure pœnalis tantum obligat ad pœnam, non item ad culpam: lex pœnalis mixta et ad culpam obligat, et ad pœnam.* (Sanderson de Con. Oblig. viii. § 16, 24.)

method of interpretation. To interrogate the legislature to decide particular disputes, is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished, by every rational civilian, from those general constitutions which had only the nature of things for their guide. The Emperor Macrinus, as his historian Capitolinus informs us, had once resolved to abolish these rescripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise,[n] and he has preserved them all. In like manner the canon laws, or decretal epistles of the Popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

The intention of a law must be gathered,

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of them all. Let us take a short view of them all.

1. from the words.

[60] 1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorff,[o] which forbade a layman to *lay hands* on a priest, was adjudged to extend to him who had hurt a priest with a weapon. Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the Princess Sophia and the heirs of her body, being Protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words, "*heirs of her body*," which in a legal sense comprise only certain of her lineal descendants.

2. If words happen to be still dubious, we may establish

[n] Inst. i. 2, 6.

[o] L. of N. and N. 5, 12, 3.

their meaning from the *context;* with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the preamble, is often called in to help the construction of an Act of Parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declared murder to be felony without benefit of clergy, it was necessary to resort to the same law of England to learn what the benefit of clergy was: and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony. **2. from the context.**

3. As to the *subject-matter,* words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the Pope were called *provisions,* [61] we shall see that the restraint is intended to be laid upon such provisions only. **3. from the subject-matter.**

4. As to the *effects* and *consequence,* the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them, Therefore the Bolognian law mentioned by Puffendorf,[p] which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," was held after a long debate not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit.[q] **4. from the consequences.**

5. But, lastly, the most universal and effectual way of

[p] L. 5, c. 12, s. 8.

[q] The stat. De frangentibus prisonam (1 Edw. II.) enacts, that a prisoner who breaks prison is guilty of felony; but if the prison be on fire, this is not so, "for he is not to be hanged because he would not stay to be burnt." (Plowd. 13.)

and 5, from the reason and spirit of the law. discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislature to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius.[r] There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who stayed in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was to give encouragement to such as should venture their lives to save the vessel: but this is a merit which he could never pretend to, who neither stayed in the ship upon that account, nor contributed anything to its preservation.

The "equity of a statute."

[62]

From this method of interpreting laws, by the reason of them, arises what has been termed "the equity of a statute," which is thus defined by Grotius,[s] "the correction of that wherein the law (by reason of its universality) is deficient." For, since in laws all cases cannot be foreseen or expressed, it is necessary that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"

Equity[t] thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest

[r] L. 1, c. 11.

[s] De Æquitate, s. 3.

[t] By "equity" in this place is by no means to be understood the system of established rules on which the Courts of Chancery administer justice.

thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

SECTION III.

OF THE LAWS OF ENGLAND.

[63] The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.

1. Leges non scriptæ, or Common Law.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.

When I call these parts of our law *leges non scriptæ*, I would not be understood as if all those laws were at present merely *oral*, or communicated from former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic Druids committed all their laws as well as learning to memory;[a] and it is said of the primitive Saxons here, as well as their brethren on the Continent, that *leges solâ memoriâ et usu retinebant*.[b] But with us, at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of
[64] reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. I, therefore, style these

[a] Cæs. de B. G. lib. 6, c. 13. [b] Spelm. Gl. 362.

parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing, as Acts of Parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that which is "*tacito et illiterato hominum consensu et moribus expressum.*"

Our ancient lawyers, and particularly Fortescue, insist with abundance of warmth that these customs are as old as the primitive Britons, and continued down, through the several mutations of governments and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some; but in general, as Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another: though the Romans, the Picts, the Saxons, the Danes, and the Normans, who successively occupied parts of England, must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby in all probability improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries.[c] Our laws, says Lord Bacon, are mixed as our language: and as our language is so much the richer, the laws are the more complete.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature.[d] For they tell us, that in the time of Alfred

Laws of Alfred.

[c] See the very curious and interesting volume of Ancient Laws and Institutes of Wales, edited by Aneurin Owen, and printed under the direction of the Commissioners on the Public Records of the Kingdom, A.D. 1841.

[d] Although the text of Blackstone has been here preserved, his statements in the next page must not be implicitly followed by those who desire to have a strictly-accurate knowledge of the written laws of our ancestors. "What we now possess of Anglo-Saxon law is but a portion of what once existed, and, therefore, without claim to the title of the Anglo-Saxon Laws which has usually been bestowed on it. Of the laws and kindred documents no longer extant, the names of some, together with fragments worked into other codes, have been transmitted to us; such as the Mercian laws of Offa, from which Alfred, in framing his body of laws, selected such portions as were suitable to his purpose; the South Anglian laws, the Frid-gewritu, &c. At the same time, we ought not, perhaps, to suppose that, among our Saxon forefathers, any more than among ourselves, there ever existed a complete corpus juris Anglici, but that theirs was also a customary or common law; and that what we still possess, and also the portion that has perished,

the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *dome-book*, or *liber judicialis*, for the general use of the
[65] whole kingdom. This book is said to have been extant so late as the reign of King Edward the Fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of King Edward the Elder, the son of Alfred. "King Edward commands all the reeves: that ye judge such just dooms as ye know to be most righteous, and it in the doom-book (*Saxonice*, ꝺom-boc), stands, Fear not on any account to pronounce folk-right (*Saxonice*, ꝼolc-ꞃihꞇ); and that every suit have a term when it shall be brought forward, that ye then may pronounce."[e]

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse; or at least to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts. 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxen-Lage*, or laws of the West Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which

were either the records of decisions to serve as precedents for the future, or enactments passed in the Witenagemots for the repeal, confirmation, amendment, or completion of the law as it then stood." (Thorpe's Preface to the Ancient Laws and Institutes of England.)

[e] See Thorpe's Ancient Laws and Institutes of England, printed under the direction of the Commissioners on the Public Records of the Kingdom, 1840. The reference to the doom-book may have been not to the laws of Alfred, but to the earlier dooms of Inâ.

speaks its origin and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government.[f]

Out of these three laws, Roger Hoveden and Ranulphus Cestrensis inform us, King Edward the Confessor extracted one uniform law or digest of laws,[g] to be observed throughout the whole kingdom; though Hoveden and the author of an old manuscript chronicle[h] assure us likewise, that this work was projected and begun by his grandfather King Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces governed by peculiar customs. As in Portugal, under King Edward, about the beginning of the fifteenth century:[i] in Spain, under Alonzo X., who, about the year 1250, executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *las partidas*:[j] and in Sweden, about the same æra, when a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England.[k] [66]

Laws of Edward the Confessor.

Both these undertakings of King Edgar and Edward the Confessor, seem to have been no more than a new edition, or fresh promulgation of Alfred's code or dome-book, with such additions and improvements as the experience of a century and a half had suggested. For Alfred is generally styled by the same historians the *legum Anglicanarum conditor*, as Edward the Confessor is the *restitutor*. These however are the laws which our historians so often mention under the name of the laws of Edward the Confessor; which our ancestors struggled so hardly to maintain under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular

[f] Hal. Hist. 55.

[g] The extant remains of these laws, as set forth in Lambard and Wilkins, are spurious. (Hal. Mid. Ag. ii. 444.)

[h] In Seld. ad Eadmer, 6.

[i] Mod. Un. Hist. xxii. 135.

[j] Mod. Un. Hist. xx. 211.

[k] Mod. Un. Hist. xxxiii. 21, 58.

act they could do, when pressed by foreign emergencies or [67] domestic discontents. These are the laws that so vigorously withstood the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the states of the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise to that collection of maxims and customs which is now known by the name of the common law. A name either given to it, in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or more probably, as a law common to all the realm, the *jus commune* or *folk-right* mentioned by King Edward the Elder, after the abolition of the several provincial customs and particular laws before mentioned.

But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

The common law consists of, 1. general customs; 2. local customs; 3. particular laws.

This unwritten or common law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

[68] I. As to general customs, or the common law, properly so called; this is that law by which proceedings and determinations in the ordinary courts of justice are guided and directed. This, for the most part, settles the course in which

lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and Acts of Parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the Chancery, the Queen's Bench, the Common Pleas, and the Exchequer;—that the eldest son alone is heir to his ancestor;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

I. General customs.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest; and 2. Established rules and maxims; as, "that the king can do no wrong, that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by showing that it has been always the custom to observe it.

But here a very natural and very material question arises: [69] how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue[1] mentions; and

Law settled by judicial decisions.

[1] Cap. 8.

from being long personally accustomed to judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises in the determination of which former precedents may give light or assistance. And therefore, even so early as the Conquest, we find the "*præteritorum memoria eventorum*," reckoned up as one of the chief qualifications of those who were held to be "*legibus patriæ optime instituti.*"[m] For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the parti-

Margin notes: preserved in the public records. [70]

[m] Seld. Review of Tithes, c. 8.

cular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded.[n]

Authority of precedent.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by an example. It was determined, time out of mind, that a brother of the half-blood should never succeed as heir to the estate of his half-brother, but it should rather escheat to the Crown, or other superior lord. Now this was a positive law, fixed and established by custom, which custom was evidenced by judicial decisions; and therefore could never be departed from by any judge without a breach of his oath, and the law. For therein there was nothing repugnant to natural justice; though the artificial reason of it, drawn from the [71] feudal law, might not be quite obvious to everybody. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might have wished it had been otherwise settled, yet it was not in his power to alter it. 'It was the legislature alone which could and did alter the common law in this respect.'[o] *The law*, and the *opinion of the judge*, therefore, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law; but upon the whole, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.[p]

Authority of reported cases.

The decisions, therefore, of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *Reports* which furnish the

[n] Herein agreeing with the civil law, Ff. l. 3, 20, 21. "*Non omnium, quæ a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum quæ constituuntur, inquiri non oportet: alioquin multa ex his, quæ certa sunt, subvertentur.*"

[o] The rule of law here referred to was altered by stat. 3 & 4 Will. IV. c. 106, s. 9, which enacts that relations of the half-blood shall now inherit after relations in the same degree of the whole blood.

[p] C. 1. 14, 12.

lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings (which are preserved at large in the record), the arguments on both sides, and the reasons the court gave for its judgment; taken down by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The Reports are extant in a regular series from the reign of King Edward the Second inclusive;
[72] and from this time to that of Henry the Eighth were taken by the prothonotaries, or chief scribes of the court, at the expense of the Crown, and published *annually*, whence they are known under the denomination of the *Year-Books*. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day: for, though King James the First, at the instance of Lord Bacon, appointed two reporters[q] with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands; who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by Lord Chief Justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name.[r]

Coke's Reports.

The Sages of the Law.

Besides these reporters, there are also other authors, to whom great venerati n and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitz-

[q] Pat. 15, Jac. I. p. 18. 17 Rym. 26.

[r] His reports, for instance, are styled *κατ' ἐξοχὴν, the reports;* and in quoting them we usually say, 1 or 2 Rep., not 1 or 2 Coke's Rep., as in citing other authors. The Reports of Judge Croke are also cited in a peculiar manner, by the names of those princes in whose reigns the cases reported in his three volumes were determined, viz., Queen Elizabeth, King James, and King Charles I.; as well as by the number of each volume. For sometimes we call them 1, 2, and 3 Cro., but more commonly Cro. Eliz., Cro. Jac., and Cro. Car.

herbert, and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the same [73] learned judge we have just mentioned, Sir Edward Coke; who has written four volumes of institutes, as he is pleased **Coke's Institutes.** to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton, in the reign of Edward the Fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year-books, but greatly defective in method.[s] The second volume is a comment upon many old Acts of Parliament, without any systematic order; the third, a more methodical treatise of the pleas of the Crown; and the fourth, an account of the several species of courts.[t]

And thus much for the first ground and chief corner-stone of the laws of England, which is general immemorial custom or common law, declared from time to time in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

The Roman law, as practised in the times of its liberty, paid also a great regard to custom; but not so much as our law: it only then adopting it when the written law was deficient; though the reasons alleged in the Digest[u] will fully justify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For since," says Julianus, "the written law binds us for no other reason

[s] It is usually cited either by the name of Co. Litt. or as 1 Inst.

[t] These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction which is paid to the works of no other writer. Early reports are generally quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

[u] Ff. 1, 3, 28.

but because it is approved by the judgment of the people, therefore those laws which the people have approved with- [74] out writing ought also to bind everybody. For where is the difference, whether the people declare their assent to a law by suffrage, or by a uniform course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom; but when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi placuit legis habet vigorem, cum populus ei, et in eum, omne suum imperium et potestatem conferat,*" says Ulpian.[v] "*Imperator solus et conditor et interpres legis existimatur,*"[w] says the code: and again, "*sacrilegii instar est rescripto principis obviari.*"[x] And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.

II. Particular customs.

II. The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs before mentioned, out of which the common law, as it now stands, was collected at first by the Saxon kings. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large; which privilege is confirmed to them by several Acts of Parliament.[y]

Such is the custom of gavelkind in Kent and some other parts of the kingdom (though perhaps it was also general till the Norman conquest), which ordains, among other things, [75] that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord. Such is the custom that prevails in divers ancient boroughs, and therefore

[v] Ff. 1, 4, 1.
[w] C. 1, 14, 12.
[x] C. 1, 23, 5.
[y] Mag. Cart. 9 Hen. III. c. 9; 1 Edw. III. st. 2, c. 9; 14 Edw. III. st. 1, c. 1; and 2 Hen. IV. c. 1.

called borough-English, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas at the common law she shall be endowed of one third part only. Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the same manors. Such likewise is the custom of holding divers inferior courts, with power of trying causes in cities and trading towns; the right of holding which, when no royal grant can be shown, depends entirely upon immemorial and established usage. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by Act of Parliament.[z]

To this head may most properly be referred a particular system of customs used only among one set of the queen's subjects, called the custom of merchants, or *lex mercatoria:* which, however different from the general rules of the common law, is yet engrafted into it, and made a part of it;[a] being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in sua arte credendum est.*"

The rules relating to particular customs regard either the *proof* of their existence; their *legality* when proved; or their usual method of *allowance.* And first we will consider the rules of *proof.*

As to gavelkind, and borough-English, the law takes particular notice of them,[b] and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded,[c] and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged. The trial in both cases (both to show the existence of the custom, as, "that in the manor of Dale [76] Proof of customs.

z 8 Rep. 126; Cro. Car. 347.
a Winch. 24.
b Co. Litt. 175.
c Litt. § 265.

lands shall descend only to the heirs male, and never to the heirs female;" and also to show, "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court.[d]

The customs of London differ from all others in point of trial: for if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder;[e] unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for then the law permits them not to certify on their own behalf.[f]

Legality of customs.

When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for, if it is not a good custom, it ought to be no longer used. "*Malus usus abolendus est*" is an established maxim of the law.[g] To make a particular custom good, the following are necessary requisites:—

Customs must be ancient,

1. That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, it is no good custom. For which [77] reason no custom can prevail against an express Act of Parliament; since the statute itself is a proof of a time when such a custom did not exist.[h]

Uninterrupted,

2. It must have been *continued.* Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right;* for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom.[i] As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

Peaceably enjoyed,

3. It must have been *peaceable,* and acquiesced in; not

[d] Dr. and St. 1, 10.
[e] Cro. Car. 516; 1 Burr. 248.
[f] Hob. 85.
[g] Litt. § 212; 4 Inst. 274.
[h] Co. Litt. 113, 115.
[i] Co. Litt. 114.

subject to contention and dispute.[j] For as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable*;[k] or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says,[l] to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it suffices, if no good legal reason can be assigned against it. Thus a custom in a parish that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits.[m] 'So a custom for all the inhabitants of a parish to angle and catch fish in the property of another is bad, because it might lead to the destruction of the subject matter to which the alleged custom applied.'[n] Reasonable.

5. Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good.[o] A custom to pay twopence an acre, in lieu of tithes, is good; but to pay sometimes twopence, and sometimes threepence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is *id certum est, quod certum reddi potest.* [78] Certain.

6. Customs, though established by consent, must be (when Compulsory.

[j] Co. Litt. 114.
[k] Litt. § 212.
[l] Co. Litt. 62.
[m] Co. Copyh. § 33.
[n] *Bland* v. *Lipscombe*, 4 Ellis and Bl. 713 (note); *Dyce* v. *Hay*, 1 M'Queen's Appeal Cases, 305.
[o] 1 Roll. Abr. 565.

established, *compulsory;* and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

And consistent with other customs.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.[p]

Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly. Thus, by the custom of gavelkind, an infant of fifteen years [79] may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple, or for ever. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued.[q] And moreover, all special customs must submit to the royal prerogative. Therefore, if the queen purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the queen's demise, her eldest son shall succeed to those lands alone.[r]

And thus much for the second part of the *leges non scriptæ,* or those particular customs which affect particular persons or districts only.

III. Peculiar laws in particular jurisdictions.

III. The third branch of the *leges non scriptæ* are those peculiar laws which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these understand the civil and canon laws.

It may seem a little improper at first view to rank these

[p] 9 Rep. 58. [q] Co. Cop. § 33. [r] Co. Litt. 15.

laws under the head of *leges non scriptæ*, or unwritten laws, seeing they are set forth by authority in the Pandects, the Code, and the Institutes; in the decrees of councils and the decretals of popes; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of Sir Matthew Hale,[s] because it is most plain, that it is not on account of their being *written* laws that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or Acts of Parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England does not, nor ever did, recognize any foreign power as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest of its subjects. But all the strength that either the papal or imperial laws have obtained in this realm (or indeed, in any other kingdom in Europe), is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptæ*, or customary laws; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII. c. 21, addressed to the king's royal majesty:—"This your grace's realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent to be used among them; and have bound themselves by long use and custom to the observance of the same: not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed*

Authority of the civil and canon laws.

[80]

[s] Hist. C. L. c. 2.

and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise."

The Roman or Civil law. By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman Empire, as comprised in the institutes, the digest, and the code of the Emperor Justinian, and the *novellæ*, or new constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their ancient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon
[81] the imperial decrees, or constitutions of successive emperors) had grown to so great a bulk, or, as Livy expresses it,[t] "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed to be many camels' load by
Theodosian code. an author who preceded Justinian.[u] This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the Emperor Theodosius the Younger, by whose orders a code was compiled, A.D. 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe, till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly-erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

Pandects. This consists of, 1. The Institutes, which contain the elements or first principles of the Roman law, in four books. 2. The Digest, or Pandects, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematic method. 3. The Code, or *codex repetiti prelectionis*, a collection of imperial constitutions, in twelve books; the lapse

[t] L. 3, c. 34.

[u] Taylor's Elements of Civil Law, 17.

of a whole century having rendered the former code of Theodosius imperfect. 4. The *novellæ*, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code, containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *Corpus Juris Civilis*.

The canon law is a body of Roman ecclesiastical law, **The Canon Law.** relative to such matters as that church either has, or pretends [82] to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see. All which lay in the same disorder and confusion as the Roman civil law: till about the year 1151, one Gratian, a Benedictine monk of the monastery of St. Felice, at Bologna, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia discordantium Canonum*, but which are generally known by the name of *Edictum Gratiani*. These reached as low as the time of Pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX., were published in much the same method, under the auspices of that Pope, about the year 1230, in five books, entitled *Decretalium D. Gregorii Papæ IX. Compilatio*. A sixth book was added by Boniface VIII. about the year 1298, which is called *Liber sextus Decretalium D. Bonifacii Papæ VIII*. The Clementine constitutions, or decrees of Clement V., were in like manner authenticated in 1317 by his successor John XXII., who also published twenty constitutions of his own, called the *Extravagantes* **Extravagantes.** *Joannis XXII.*: all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later Popes, in five books, called *Extravagantes Communes*. And all these together, Gratian's decree, Gregory's decretals, the book of six decretals, the Clementine constitutions, and the Extravagantes of John and his successors, form the *Corpus Juris Canonici*, or body of the Roman canon law.[v]

Besides these pontifical collections, which during the times

[v] For a short notice of these different Decretals, see Dr. Irving's Introd. to the Study of the Civil Law; and for an account of the *Edictum Gratiani*, and an examination of the influence of ecclesiastical law on European legislation, see Phillimore's Inaugural Lectures on Jurisprudence: London, Benning, 1851.

of popery were received as authentic in this island as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church and kingdom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods, held under the Cardinals Otho and Othobon, legates from Pope Gregory IX. and Pope Clement IV. in the reign of King Henry III. about the years 1220 and 1268.[w] The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the reign of Henry III. to Henry Chichele in the reign of Henry V.; and adopted also by the province of York[x] in the reign of Henry VI. At the dawn of the Reformation, in the reign of King Henry VIII., it was enacted in parliament[y] that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

The Legatine constitutions. [83]

...ns of 1603.

As for the canons enacted by the clergy under James I. in the year 1603, and never confirmed in parliament, it has been solemnly adjudged, upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity;[z] whatever regard the clergy may think proper to pay them.

Courts which receive these peculiar laws.

There are four species of courts, in which the civil and canon laws are permitted (under different restrictions) to be used. 1. The courts of the archbishops and bishops, and their derivative officers, usually called, in our law, courts christian, *curiæ christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in

[w] See the Constitutions of Otho, with Notes by John William White, of Doctors' Commons: London, 1844.

[x] Burn's Eccl. Law, pref. viii.

[y] Statute 25 Hen. VIII. c. 19; revived and confirmed by the statute 1 Eliz. c. 1.

[z] Stra. 1057.

general, and the different degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by Act of Parliament, ratifying those charters which [84] confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these Commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.[a]

1. And, first, the courts of common law have the superintendence over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess,[b] and (in case of contumacy) to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal. **Control of the Courts of Common Law.**

2. The common law has reserved to itself the exposition of all such Acts of Parliament as concern either the extent of these courts, or the matters depending before them. And, therefore, if these courts either refuse to allow these Acts of Parliament, or will expound them in any other sense than what the common law puts upon them, the courts at Westminster will grant prohibitions to restrain and control them.[c]

3. An appeal lies from all these courts to the queen, in the last resort; which proves that the jurisdiction exercised in them is derived from the Crown of England, and not from any foreign potentate, or intrinsic authority of their own.—And, from these three strong marks and ensigns of superiority, it appears beyond a doubt, that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege;* and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the ecclesiastical, the military, the maritime, or the academical laws. **Appeal.**

[a] Hale, Hist. c. 2.

[b] "We cannot trust the ecclesiastical courts to determine what is a matter merely spiritual." Per Talbot L. C. Str. 1067.

[c] *Hall* v. *Maule*, 7 A. & E. 721.

[85] II. LEGES SCRIPTÆ, OR STATUTE LAW.

Let us next proceed to the *leges scriptæ*, the written laws of the kingdom, which are statutes, acts, or edicts, made by the sovereign, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled.[d] The oldest of these now extant, and printed in our statute books, is the famous *Magna Charta*, as confirmed in parliament 9 Henry III.: though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different kinds of statutes, and of some general rules with regard to their construction.[e]

General or public acts.

First, as to their several kinds. Statutes are either *general* or *special*, *public* or *private*. A general or public act is an universal rule, that regards the whole community: and [86] of this the courts of law are bound to take notice judicially and *ex officio;* without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular per-

Special or private.

[d] 8 Rep. 20.

[e] The method of citing these Acts of Parliament is various. Many of our ancient statutes are called after the name of the place where the Parliament was held that made them; as the Statutes of Merton and Marlbridge, of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject; as the statutes of Wales and Ireland, the *Articuli cleri* and the *Prærogativa Regis.* Some are distinguished by their initial words, a method of citing very ancient; being used by the Jews in denominating the books of the Pentateuch; by the Christian church in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulls; and in short by the whole body of ancient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statutes of *Quia emptores* and that of *Circumspecte agatis.* But the most usual method of citing them, especially since the time of Edward II., is by naming the year of the king's reign in which the statute was made, together with the chapter or particular act, according to its numeral order, as 9 Geo. II. c. 4. For all the acts of one session of parliament taken together make properly but one statute; and therefore when two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the Bill of Rights is cited as 1 W. & M. st. 2, c. 2, signifying that it is the second chapter or act, of the second statute, or the laws made in the second session of parliament in the first year of King William and Queen Mary.

sons, and private concerns: such as the Romans entitled *senatûs-decreta*, in contradistinction to the *senatûs-consulta*, which regarded the whole community:[f] and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shown and pleaded. Thus, to show the distinction, the statute 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the Bishop of Chester to make a lease to A. B. for sixty years, is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.[g]

Statutes also are either *declaratory* of the common law, or Declaratory. *remedial* of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case parliament has sometimes thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever has been. Thus the statute of Treasons, 25 Edw. III. c. 2, does not make any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offences which before were treason at the common law. Remedial statutes are those which are Remedial. made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, has occasioned another subordinate division of remedial Acts of Parliament into *enlarging* and *restraining* statutes. To instance [87]

[f] Gravin, Orig. 1, § 24.

[g] 'The printed statutes are classed under four heads, viz., public general acts, such as the annual mutiny acts, the excise acts, &c.; local and personal acts declared public, and to be judicially noticed, such as railway acts; private acts, printed by the queen's printer, and whereof the copies purporting to be so printed may be given in evidence, such as estate acts; and private acts not printed, such as divorce acts. See, however, the statute 13 & 14 Vic. c. 21, s. 7.'

again in the case of treason. Clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law: therefore it was thought expedient by statute 5 Eliz. c. 11, 'which is now repealed, however,' to make it high treason, which it was not at the common law: so that this was an *enlarging* statute. At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute 13 Eliz. before mentioned: this was therefore a *restraining* statute.

Rules of construction.

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow:

1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the legislature has provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy.[h] Let us instance again in the same restraining statute of 13 Eliz. c. 10. By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors; the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years. Now in the construction of this statute it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a dean and chapter, they are not void during the continuance of the dean: for the act was made for the benefit and protection of the successor.[i] The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors;
[88] but the leases, during their continuance, being not within the mischief, are not within the remedy.

2. A statute, which treats of things or persons of an inferior rank, cannot, by any *general words* be extended to those of

[h] *Heydon's case*, 3 Rep. 7; Co. Litt. 11, 42.
[i] Co. Litt. 45; 3 Rep. 60; 10 Rep. 58.

a superior.[j] So a statute, treating of "deans, prebendaries, parsons, vicars, *and others having spiritual promotion*," is held not to extend to bishops, though they have spiritual promotion; deans being the highest persons named, and bishops being of a still higher order.[k]

3. Penal statutes must be construed strictly. 'This rule was formerly carried to an absurd extent.' Thus the statute 1 Edw. VI. c. 12, having enacted that those who were convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one *horse*, and therefore procured a new act for that purpose in the following year.[l] To come nearer our own times, however, by the statute 14 Geo. II. c. 6, stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next session, it was found necessary to make another statute, 15 Geo. II. c. 34, extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name.[m]

Penal statutes to be construed strictly.

4. Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, it is then to be taken strictly: but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, &c., made

Statutes against frauds construed liberally.

[j] Unless the general words would otherwise be entirely void. Thus, the statute of Marlbridge, amending the law as to essoigns, enumerates essoigns in counties, hundreds, or in courts baron, or in other courts; and the general words "other courts" were held to extend to the King's Courts of Record at Westminster and elsewhere. (2 Inst. 137.)

'Modern statutes have generally what is termed an "interpretation clause," the object of which is to define what is to be understood by certain general words used, as that "lands" shall include "hereditaments," such as a right of way. And see 13 & 14 Vic. c. 21, s. 4.'

[k] 2 Rep. 46.

[l] 2 & 3 Edw. VI. c. 33; Bac. Elem. c. 12.

[m] The statute now in force on this subject is the 7 & 8 Geo. IV. c. 29, s. 25.

[89] to defraud creditors *and others*, was held to extend by the general words to a gift made to defraud the Crown of a forfeiture.[n]

Every part of a statute to stand.

5. One part of the statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by Act of Parliament, saving the right of A.; and A. has at that time a lease of it for three years: here A. shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

A saving, repugnant to the body of an act, void.

6. A saving, totally repugnant to the body of the act, is void. If therefore an Act of Parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.: in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king.[o]

Common law yields to a statute, and an old statute to a new one.

7. Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. And this upon a general principle of universal law, that "*leges posteriores priores contrarias abrogant:*" consonant to which, it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto.*" But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it necessarily implies a negative. As, if a former act says, that a juror upon such a trial shall have twenty pounds a year: and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made a qualification sufficient, the former
[90] statute which requires twenty pounds is at an end.[p] But if

[n] 3 Rep. 82.

[o] 1 Rep. 47. This rule must be taken with this limitation, that a distinct clause engrafted upon a preceding and complete enactment, though totally repugnant to the body or provision of the act, is not void, but operates as a repeal of the preceding enactment. (Fitz. 195.)

[p] Jenk. Cent. 2, 73.

both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and the latter law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere.*[q]

Statutes, to bind the legislature, inoperative.

8. Acts of Parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1, which directs that no person, for assisting a king *de facto*, shall be attainted of treason by Act of Parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder.[r] Because the legislature, being in truth the sovereign power, is always of equal, always of absolute, authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavoured to tie up the hands of succeeding legislatures. "When you repeal the law itself," says he, "you at the same time repeal the prohibitory [91]
clause, which guards against such repeal."[s]

Statutes, impossible to be performed, void.

9. Lastly, Acts of Parliament that are impossible to be performed are of no validity: and if there arise out of them

[q] 11 Rep. 63. 'Formerly, if a statute that repealed another was itself repealed afterwards, the first statute was thereby revived, without any formal words for that purpose. So, when the statutes of 26 and 35 Hen. VIII., declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz., there needed not any express words of revival in Queen Elizabeth's statute, but these acts of King Henry were impliedly and virtually revived (4 Inst. 325). See the case of the *Seven Bishops*, 12 Rep. 7, and *Phillips* v. *Hopwood*, 10 B. & C. 39. But this rule of law has been altered by the stat. 12 & 13 Vic. c. 21, s. 5, which enacts that repealed statutes shall not be revived by the repeal of the act repealing them, unless express words be added reviving such repealed acts.'

[r] 4 Inst. 33.

[s] *Cum lex abrogatur, illud ipsum abrogatur, quod non eam abrogari oporteat.* l. 3, Ep. 23.

collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that Acts of Parliament contrary to reason are void.[t] But if the legislature positively enacts a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the legislature, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus, if an Act of Parliament gives a man power to try all causes that arise within his manor of Dale; yet if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel.[u] But, if we could conceive it possible for the legislature to enact that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no.

These are the several grounds of the laws of England: over and above which, Equity is also frequently called in to
[92] assist, to moderate and to explain them. What equity is, and how impossible in its very essence to be reduced to stated rules, has been shown in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common law judges interpret Acts of Parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar Courts of Equity established for the benefit of the subject; to detect latent frauds

[t] *Bonham's* case, 8 Rep. 115; *City of London* v. *Wood*, 12 Mod. 687.
[u] 8 Rep. 118.

and concealments, which the process of the Courts of Law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of our Courts of Equity, 'as shall be more fully pointed out hereafter. But these courts are' only conversant in matters of property, for the freedom of our constitution will not permit, that, in criminal cases, a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be restrained by partiality to inflict a penalty beyond what the letter will warrant; and in cases where the letter induces any apparent hardship, the Crown has the power to pardon 'the offender, or modify his punishment.'

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

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[93] The kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any part of the queen's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

Wales. Wales continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for many centuries; even from the time of the hostile invasions of the Saxons, when the ancient and Christian inhabitants of the island retired to those natural intrenchments, for protection from their pagan visitants. But when these invaders themselves were converted to Christianity, and settled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were overrun by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence, till at length in the reign of Edward the First, who may justly be styled the
[94] conqueror of Wales, the line of their ancient princes was abolished, and the king of England's eldest son became their titular prince;[a] the territory of Wales being then entirely

[a] 'Sir William Blackstone says, however, without quoting any authority, that "very early in our history, we find their princes doing homage to the

annexed to the dominion of the Crown of England.[b] By the statute of Wales very material alterations were made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings: but they still retained very much of their original polity; particularly their rule of inheritance, viz., that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still farther abridged; but the finishing stroke to their independence was given by the statute 27 Hen. VIII. c. 26, which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty: being insensibly put upon the same footing, and made fellow-citizens with their conquerors;—a generous method of triumph, which the republic of Rome practised with great success, till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

It is enacted by this statute 27 Hen. VIII.:—1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no other, [95] shall be used in Wales: besides many other regulations of the police of this principality. And the statute of 34 and 35 Hen. VIII. c. 26, confirms the same, adds farther regulations, divides the principality into twelve shires, and, in short, reduces it into nearly the same order in which it stands at

Crown of England;" and he speaks of Wales being "reannexed by a kind of feudal resumption" to the Crown of England. But the feudal law was quite unknown in Wales. There are no copyhold tenures, and scarcely an instance of what are called manorial rights; and the property was entirely free and allodial. (Barrington's Obs. on the Ancient Statutes.) So that we have no authority for the "feudal resumption" theory, except the statement of Edward himself, in the Statutum Walliæ.'

[b] Vaugh. 400. The Statutum Walliæ (12 Edw. I.) bears date *apud Rothelanum*, or Rhuydland, in Flintshire, and is to the following effect: "*terra Walliæ cum incolis suis, prius regi jure feodali subjecta, jam in proprietatis dominium totaliter et cum integritate conversa est, et coronæ regni Angliæ tanquam pars corporis ejusdem annexa et unita.*"

this day. 'After this statute Wales still differed from England in a few particulars,' such as having courts within itself, independent of the process of Westminster Hall; 'but by the statute 1 Will. IV. c. 70, the Welsh courts, both of law and equity, were abolished, and the administration of justice in the principality is now uniform with that of England.'

Laws of Scotland before the Union.

The kingdom of Scotland, notwithstanding the union of the crowns on the accession of James VI. of Scotland to the throne of England, continued an entirely separate and distinct kingdom for above a century more, though a union had been long projected; which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity in their laws. By an Act of Parliament, 1 Jac. I. c. 1, it is declared that these two mighty, famous, and ancient kingdoms were formerly one. And Sir Edward Coke observes,[c] how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent of the crown, their parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same; especially as their most ancient and authentic book, called *Regiam Majestatem*, and containing the rules of *their* ancient common law, is extremely similar to that of Glanvil, which contains the principles of *ours*, as it stood in the reign of Henry II.[d] And the many diversities subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms.[e]

[96] However, Sir Edward Coke, and the politicians of that

[c] 4 Inst. 345.

[d] 'The treatise attributed to Glanvil is the most ancient book now extant on the law of England. It was at a very early period adopted in Scotland, with a few changes and modifications, and under this new form bears the title of Regiam Majestatem, from the initial words of the prologue, which is little more than a transcript from the Proemium of Justinian's Institutes, which begins "Imperatoriam Majestatem." (Dr. Irving's Introd. to the Study of the Civil Law, p. 83).'

[e] And see Hallam Constit. Hist. of Eng. vol. iii. ch. 17.

time, conceived great difficulties in carrying on the projected union: but these were at length overcome, and the great work was happily effected in 1707, 5 & 6 Anne; when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable being as follows:— Union of England with Scotland.

1. That on the first of May, 1707, and for ever after, the kingdom of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.*

16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdoms.

11. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force; though alterable by the parliament of Great Britain. Yet with this caution: that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

22. Sixteen peers are to be chosen[f] to represent the peerage of Scotland in parliament, and forty-five[g] members to sit in the house of commons. [97]

23. The sixteen peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers,

[f] 2 & 3 Will. IV. c. 63.

[g] 'Now fifty-three, of whom thirty are representatives for counties, and twenty-three for boroughs. 2 & 3 Will. IV. c. 65; 4 & 5 Will. IV. c. 88; 5 & 6 Will. IV. c. 78.'

except sitting in the house of lords, and voting on the trial of a peer.[h]

These are the principal of the twenty-five articles of union, which are ratified and confirmed by the statute 5 Ann. c. 8, in which statute there are also two Acts of Parliament recited; the one of Scotland, whereby the Church of Scotland and also the four universities of that kingdom are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Ann. c. 6, whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the same had been altered by parliament at that time) and all other acts then in force for the preservation of the Church of England, are declared perpetual; and it is stipulated, that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed. And it is enacted, that these two acts "shall for ever be observed as fundamental and essential conditions of the union."

Fundamental principles of the Union.

Upon these articles and act of union, it is to be observed,— 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points, which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union."[i] 2. That whatever else may be deemed "funda-

[h] This article has been construed to prevent the Crown from creating new Scotch peerages; on the ground that any such creation would interfere with the elective rights of the peerages of Scotland *in esse* at the time of the union.

[i] It may justly be doubted, whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union; for the bare idea of a state, without a power somewhere vested to alter every part of its laws, is the height of political absurdity. The truth seems to be, that in such an *incorporate union* (which is well distinguished by a very learned prelate from a *federate alliance*, where such an infringement would certainly rescind the compact), the two contracting states are totally annihilated, without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's Alliance, 195.) But the wanton or imprudent exertion of this right would probably raise a very alarming ferment in the minds of individuals; and therefore, it is hinted above that such an attempt might *endanger* (though by no means *destroy*) the union.

To illustrate this matter a little farther; an Act of Parliament to repeal or alter the act of uniformity in England,

mental and essential conditions," the preservation of the two churches of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England (unless with the consent of the respective churches, collectively or representatively given), would be an infringement of these "fundamental and essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally speaking, of no force or validity in Scotland; and, consequently, in the ensuing Commentaries very few occasions will present themselves for mentioning, any farther than sometimes by way of illustration, the municipal laws of that part of the United Kingdoms.[j]

The town of Berwick-upon-Tweed, was originally part of the kingdom of Scotland; and, as such, was for a time reduced by King Edward I. into the possession of the Crown of England: and during such its subjection, it received from that prince a charter, which (after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by King Edward III. with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of King Alexander, that is, before its reduction by Edward I. Its [99] Town of Berwick-upon-Tweed.

or to establish episcopacy in Scotland, would doubtless, in point of authority, be sufficiently valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals So sacred, indeed, are the laws above mentioned (for protecting each church and the English liturgy) esteemed, that in the regency acts, both of 1751 and 1765, the regents are expressly disabled from assenting to the repeal or alteration of either these, or the act of settlement.

j 'When Scotland is not to be affected by any public general statute, a clause is generally inserted for that purpose.'

constitution was new-modelled, and put upon an English footing by a charter of King James I.; and all its liberties, franchises, and customs, were confirmed in parliament by the statutes 22 Edw. IV. c. 8, and 2 Jac. I. c. 28.[k] Though therefore it had some local peculiarities, derived from the ancient laws of Scotland,[l] yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all Acts of the British Parliament, whether specially named or otherwise. And therefore it was (perhaps superfluously) declared by statute 20 Geo. II. c. 42, that where England only is mentioned in any Act of Parliament, the same notwithstanding has and shall be deemed to comprehend the dominion of Wales and town of Berwick-upon-Tweed. And though certain of the writs of the courts of Westminster do not usually run into Berwick, yet it has been solemnly adjudged[m] that all prerogative writs (as those of *mandamus*, *prohibition*, *habeas corpus*, *certiorari*, &c.) may issue to Berwick, as well as to every other of the dominions of the Crown of England, and that indictments and other local matters arising in the town of Berwick may be tried by a jury of the county of Northumberland.

Ireland formed a distinct kingdom.

As to Ireland, that 'was, until the union in 1801,' a distinct kingdom, though a dependent subordinate kingdom. It was only entitled the Dominion or Lordship of Ireland,[n] and the [100] royal style was no other than *Dominus Hiberniæ*, Lord of Ireland, till the thirty-third year of King Henry the Eighth; when the title of King 'was conferred by an act of the Irish legislature,'[o] which is recognized by Act of Parliament 35 Hen. VIII. c. 3. Scotland and England are now one and the same kingdom, yet differ in their municipal laws; England and Ireland, on the other hand, though so long distinct kingdoms, yet in general agreed in their laws; for after the conquest of Ireland by King Henry the Second, the laws of England were received and sworn to by the Irish nation, assembled at the council of Lismore.[p]

[k] *Rex* v. *Cowle*, 2 Burr. 834.

[l] Hale, Hist. C. L. 183; 1 Sid. 382, 462; 2 Show. 365.

[m] Cro. Jac. 543; 2 Rol. Abr. 292; stat. 11 Geo. I. c. 4; 2 Burr. 834, 855. *Mayor of Berwick* v. *Shanks*, 3 Bing. 459. 5 & 6 Will. IV. c. 76, § 109.

[n] Stat. Hiberniæ, 14 Hen. III.

[o] 33 Hen. VIII. c. 1.

[p] Pryn. on 4 Inst. 249.

At the time of this conquest the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons.[q] But King John, in the twelfth year of his reign, went into Ireland, and carried over with him many able sages of the law; and there, by his letters patent, is said to have ordained and established that Ireland should be governed by the laws of England:[r] which letters patent Sir Edward Coke[s] apprehends to have been there confirmed in parliament. But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the Third[t] and Edward the First[u] were obliged to renew the injunction; and at length in a parliament holden at Kilkenny (40 Edw. III.), under Lionel Duke of Clarence, the then Lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of Queen Elizabeth, the wild natives still kept and preserved their Brehon law; which is described[v] to have been "a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great show of equity in determining the right between party and party, but in many things repugnant quite both to God's laws and man's." The latter part of this character is alone ascribed to it by the laws before cited of Edward the First and his grandson.

The Brehon law.

[101]

But as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed that though the immemorial customs, or common law of England, were made the rule of justice in Ireland also, yet no Acts of the English Parliament, since the twelfth of King John, extended into that kingdom.[w] And this is particularly expressed, and the

Ireland formerly not bound by English statutes.

[q] 4 Inst. 358; Edm. Spenser's State of Ireland, p. 1513, edit. Hughes.

[r] Vaugh. 294; 2 Pryn. Rec. 85; 7 Rep. 23.

[s] 1 Inst. 141.

[t] A. R. 30; 1 Rym. Foed. 442.

[u] A. R. 5.—*Pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censeri non debeant; nobis et consilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.* 3 Pryn. Rec. 1218.

[v] Edm. Spenser, ibid.

[w] Sir William Blackstone here adds, 'unless it were specially named, or included under general words, such as 'within any of the king's dominions;'" and shortly afterwards thus maintains this proposition: "The general run of laws, enacted by the superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries; which, bearing no part in the legislature, are not therefore in its

reason given in the Year-book:[x] "a tax granted by the parliament of England shall not bind those of Ireland, because they are not summoned to our parliament:" and again, "Ireland hath a parliament of its own, and maketh and altereth laws; and our statutes do not bind them, because they do not send knights to our parliament: but their persons are the king's subjects, like as the inhabitants of Calais, Gascoigne, and Guienne, while they continued under the king's subjection."

[102] The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper.[y] But an ill use being made of this liberty, particularly by Lord Gormanstown, deputy-lieutenant in the reign of Edward IV.,[z] a set of statutes was there enacted in the 10 Hen. VII. (Sir Edward Poynings being then lord deputy, whence they are called Poynings' laws), one of which,[a] in order to restrain the power as well of the deputy as the Irish parliament, provided, 1. That before any parliament was summoned or holden, the chief governor and council of Ireland should certify to the king under the great seal of Ireland the considerations and causes thereof, and the articles of the acts proposed to be passed therein. 2. That after the king, in his council of England, should have considered, approved, or altered the said acts or any of them, and certified them back under the great seal of England, and should have given license to summon and hold a parliament, then the same should be summoned and held; and therein the said acts so certified, and no other, should be proposed, received, or rejected.[b] But as this precluded any law from being proposed, but such as were preconceived before the parliament

Poynings' laws.

ordinary and daily contemplation. But, when the sovereign legislative power sees it necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt but then they are bound by its laws." (Year-book, 1 Hen. VII. 3; 7 Rep. 22, *Calvin's* case; Bl. Com. p. [101].) 'Admitting the parliament of England to have been a *sovereign* legislature, there is no difficulty in the learned commentator's view as to the dependency of Ireland. But the Year-books seem to demonstrate that the acts of the parliament of England could not bind Ireland; and this was evidently the opinion held by Sir Edward Coke.'

[x] 20 Hen. VI. 8; 2 Rich. III. 12.

[y] Irish Stat. 11 Eliz. stat. 3, c. 8.

[z] Irish Stat. 10 Hen. VII. c. 23.

[a] Cap. 4, expounded by 3 & 4 Ph. & M. c. 4.

[b] 4 Inst. 353.

was in being, which occasioned many inconveniences, and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary before cited, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means, however, there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering any law.[c]

The Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law; and, the measures of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted by another of Poynings' laws [cap. 22], that all Acts of Parliament, before made in England, should be of force within the realm of Ireland.[d] By the same rule, that no laws made in England, between King John's time and Poynings' law, were then binding in Ireland, it follows that no acts of the English parliament made since the 10 Hen. VII. could bind the people of Ireland.[e]

Accordingly, it became necessary[f] to declare how that matter really stood: and therefore by stat. 6 Geo. I. c. 5, it [104

[c] Before the union, the usage was, that bills should be framed in either house, under the denomination of "heads for a bill or bills:" and in that shape they were offered to the consideration of the lord lieutenant and privy council: who upon such parliamentary intimation, or otherwise upon the application of private persons, received and transmitted such heads to England, or rejected them without, of course, any such transmission. Poynings' law, in particular, could not be repealed or suspended, unless the bill for that purpose, before it was certified to England, had been approved by both houses. (Ir. St. 11 Eliz. st. 3, c. 38.)

[d] 4 Inst. 351.

[e] Sir William Blackstone again adds here, "unless specially named or included under general words. (12 Rep. 112.) And on the other hand it is equally clear, that where Ireland is particularly named, or is included under general words, they are bound by such Acts of Parliament. For this follows from the very nature and constitution of a dependent state: dependence being very little else but an obligation to conform to the will or law of that superior person or state upon which the inferior depends. The original and true ground of this superiority, in the present case, is what we usually call, though somewhat improperly, the right of conquest: a right allowed by the law of nations, if not by that of nature; but which in reason and civil policy can mean nothing more, than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies." (Puff. L. of N. viii. 6, 24.)

[f] According to Blackstone, from the "state of dependence being almost forgotten, and ready to be disputed by the Irish nation."

is declared, that the kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial Crown of Great Britain, as being inseparably united thereto: and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, has power to make laws to bind the people of Ireland. 'This statute was, however, repealed by the statute 22 Geo. III. c. 58; and by statute 23 Geo. III. c. 28, it was declared that in all cases whatever, the people of Ireland should be bound only by laws enacted by his majesty and the parliament of that kingdom, the effect of which was evidently to make the legislature of Ireland as sovereign as the legislature of Great Britain had by the statute of Geo. I. attempted to make itself.'

'In the meantime, by the Irish act 21 & 22 Geo. III. c. 48 (Yelverton's act), it had been enacted that all statutes then made in England or Great Britain, should be accepted, used, and executed in Ireland.'

Thus we see how extensively the laws of Ireland communicate with those of England: and indeed such communication is highly necessary, as the ultimate resort from the courts of justice in Ireland, 'was and now' is to those in England. A writ of error lay formerly from the king's bench in Ireland to the king's bench in England;[g] and an appeal from the chancery in Ireland lay immediately to the House of Lords here (it being expressly declared, by the statute 6 Geo. I. c. 5, that the peers of Ireland have no jurisdiction to affirm or reverse any judgments or decrees whatsoever[h]), until the above-mentioned statute 23 Geo. III. c. 28, enacted, that no appeal or writ of error should be brought from any court in Ireland to any court in England. 'The Act of Union restored the right of appeal in both cases.'

[g] This was law in the time of Hen. VIII., as appears by the ancient book, called *Diversité des Courtes*, c. *bank le roy*.

[h] Sir William Blackstone certainly considered the stat. 6 Geo. I. c. 5 binding on Ireland. He adds in this place: "The propriety and even necessity, in all inferior dominions, of this constitution, 'that, though justice be in genera administered by courts of their own, yet that the appeal in the last resort ought to be to the courts of the superior state,' is founded upon these two reasons. 1. Because otherwise the law, appointed or permitted to such inferior dominion, might be insensibly changed within itself, without the assent of the superior. 2. Because otherwise judgments might be given to the disadvantage or diminution of the superiority, or to make the dependence to be only of the person of the king, and not of the Crown of England." (Vaugh. 402.)

'The legislative union of Great Britain and Ireland was effected in the year 1800, with what difficulties and by what means need not here be mentioned.'

The purport of the eight articles of this union as contained in the British statute 39 and 40 Geo. III. c. 47, and Irish statute 40 Geo. IV. c. 38, are as follows:—

1. The kingdoms of Great Britain and Ireland are (from 1st January 1801) united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland.

2. The succession to the crown of the United Kingdom is settled in the same manner as the succession to the Crown of Great Britain and Ireland stood before limited.

3. The United Kingdom is to be represented in one and the same parliament, styled, "the Parliament of the United Kingdom of Great Britain and Ireland."

4. Four lords spiritual of Ireland by rotation of sessions, and twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, are to sit in the House of Lords. A peer of Ireland not elected to sit in the House of Lords is to be capable of serving in the House of Commons; and no creation of an Irish peerage is to take place, unless three Irish peerages shall have become extinct, until the number of Irish peers is reduced to one hundred; but the peerage of Ireland is to be kept up to that number over and above the number of such of the said peers as shall be entitled to a hereditary seat in the House of Lords.[i] One hundred commoners, two for each county, two for the city of Dublin, and two for the city of Cork, one for Trinity College, and one for each of the thirty-one most considerable cities and boroughs, constitute the number to sit and vote in the House of Commons on the part of Ireland.[j]

5. The churches of England and Ireland are united into one Protestant episcopal church, to be called "The United Church of England and Ireland," and the doctrine, worship, discipline, and government are to be and remain the same as already established in England; and the continuance and preservation of the united church so established is to be deemed an essential and fundamental part of the union; and in like manner the church of Scotland is to

[i] *Fermoy* peerage, Session 1855-56.

[j] Five members were added by the Irish Reform Act 2 & 3 Will. IV. c. 88, s. 9.

remain the same as is now established by law, and by the acts of the union of England and Scotland.

6. The subjects of Great Britain and Ireland are to be entitled to the same rights and privileges in trade and navigation, and also in treaties with foreign powers. All prohibitions and bounties upon the importation of merchandize from one country to the other are to cease; but the importation of certain enumerated articles is to be subject to the duties specified in the act.

7. The sinking fund and the interest of the national debt of each country are to be defrayed by each separately; and for the space of twenty years after the union, the contributions of Great Britain and Ireland towards the public expenditure in each year were to be in the proportion of fifteen to two, and be subject to future regulations.

8. All the laws and courts of each kingdom are to remain as then established, subject to alterations by the united parliament; but all writs of error and appeals are to be decided by the House of Lords of the United Kingdom, except appeals from the Court of Admiralty in Ireland, which are to be decided by a court of delegates appointed by the Court of Chancery in Ireland. All existing laws contrary to these articles are repealed.

[105] With regard to the other adjacent islands, which are subject to the Crown of Great Britain, some of them (as the Isle of Wight, of Portland, of Thanet, &c.) are comprised within some neighbouring county, and are therefore to be looked upon as annexed to the mother island, and part of the kingdom of England. But there are others which require a more particular consideration.

[106] And first, the Isle of Man is a distinct territory from England, and is not governed by our laws: neither does any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there.[k] It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to King John and Henry III. of England; afterwards to the kings of Scotland; and then again to the Crown of England: and at length we find King Henry IV. claiming the island by right of conquest, and

[k] 4 Inst. 284; 2 And. 116. See 16 & 17 Vict. c. 107, s. 346.

disposing of it to the Earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley by letters patent 7 Hen. IV.[l] In his lineal descendants it continued for eight generations till the death of Fernando Earl of Derby, A.D. 1594: when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother: upon which, and a doubt that was started concerning the validity of the original patent,[m] the island was seized into the queen's hands, and afterwards various grants were made of it by King James the First; all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William Earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by Act of Parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James Earl of Derby, A.D. 1735, the male line of Earl William failing, the Duke of Atholl succeeded to the island as heir-general by a female branch. In the meantime, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting or dissenting to laws, and exercising an appellate jurisdiction. Yet though no English writ, or process from the courts of Westminster was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council.[n] But the distinct jurisdiction of this little subordinate royalty being found inconvenient for [107] the purposes of public justice, and for the revenue (it affording a commodious asylum for debtors, outlaws, and smugglers), authority was given to the treasury by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors for the use of the Crown: which purchase was at length completed in the year 1765, and confirmed by parliament.[o] The whole island and all its dependencies, by subsequent statutes[p] became inalienably vested in the Crown, and subject to the regulations of the British excise and customs. 'The writ of *habeas corpus* runs into the Isle of Man (56 Geo. III. c. 100), but this and all other prerogative writs were issuable at

Isle of Man.

[l] Selden, Tit. Hon. 1, 3.

[m] Camden, Eliz. A.D. 1594.

[n] 1 P. Wms. 329.

[o] 5 Geo. III. cc. 26 and 39.

[p] 43 Geo. III. cc. 123; 6 Geo. IV. c. 34.

common law to all the dominions of the Crown.[q] By statute 2 & 3 Will. IV. c. 33, and 4 & 5 Wm. IV. c. 82, process from the Court of Chancery also issues to the Isle of Man.'

Islands of Jersey, Guernsey, Sark, Alderney, &c.

The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the Duchy of Normandy, and were united to the Crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an ancient book of very great authority, entitled, *Le Grand Coustumier*. The queen's ordinary writ, or process from the courts of Westminster, is there of no force; but her commission is. 'The writ of habeas corpus, however, and the other prerogative writs, run into these islands.'[r] They are not bound by common Acts of our Parliaments, unless particularly named.[s] All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the queen in council, in the last resort.

The Colonies.

Besides these adjacent islands, our more distant colonies and dependencies are also in some respects subject to the English laws. Colonies, 'or plantations as they were formerly termed,' in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by
[108] treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it has been held,[t] that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject,[u] are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protec-

[q] 2 Burr. 856.

[r] *Carus Wilson's* case, 7 Q. B. 984; *Rex* v. *Cowle*, 2 Burr. 856.

[s] 4 Inst. 286. 16 & 17 Vict. c. 107, s. 359.

[t] Salk. 411, 666.

[u] 2 P. Wms. 75.

tion from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.

'Our colonies, or more correctly speaking, dependencies, may be generally divided, as regards their existing political institutions, into three classes:—

'I. Dependencies possessing representative institutions under grant from the Crown, usually by commission, sometimes by order in council or charter. To this class belong Jamaica and all the older or British West Indian colonies; all the North American colonies (except Canada and Newfoundland), the Cape of Good Hope, and Malta.'

'II. Dependencies of which the constitution has been established by Act of Parliament. An Act of Parliament has been requisite in some cases to give representative institutions where former acts or other obstacles stood in the way; in other cases to establish crown or nominated councils where thought expedient. To the first division belong Canada, Newfoundland, the Australian colonies generally, and New Zealand; to the latter, Western Australia, the settlements on the west coast of Africa, St. Helena, Hong Kong, the Falkland Islands, and the territories of the East India Company.'

'The constitutions under both these classes (that is to say, whether established by the Crown or by Parliament) have been framed generally on the model of that of the parent state. The governor, legislative council, and house of assembly have respectively represented, in theory at least, the sovereign, lords, and commons of the imperial parliament. In every British dependency, the personal authority of the sovereign is represented and executed by the governor, who is uniformly appointed by royal commission. He has the prerogative of summoning, adjourning, proroguing, and dissolving all legislative assemblies; of veto on all their bills; of reprieving and pardoning under certain restrictions; of suspending for misconduct all officers, civil, naval, and

military, in his colony. The appointment to many salaried offices is vested in him by law in certain colonies; but as a general principle, colonial appointments are vested in the Crown, and made by the secretary of state. It is, however, understood that appointments under 300*l.* a-year are left to governors, while their recommendations are very generally followed as to others. He is custodian of the public seal of the colony. Process is issued by him, and tested in his name. He has the general superintendence of education within his colony. He appoints on behalf of the Crown to ecclesiastical benefices in the colonies, when these exist. The moneys to be expended for the public service are issued under his warrant. He is vice-admiral within the limits of his government. He is also captain-general and commander-in-chief in all colonies, except those in which the command of her majesty's land forces may be specially committed to a military officer of the rank of colonel.'

'Under the old colonial constitutions, extensive powers of a judicial nature were vested in governors. They received, generally speaking, not only in name, but in fact, the authority of the Court of Chancery, and also of courts of error at common law. They also received certain branches of ecclesiastical jurisdiction, such as the grant of probates, administrations, and licences for marriage. The chief remains of these old usages are now to be found in the West India Islands; but the powers of most governors in these respects have been so curtailed by modern legislation, that their enumeration is now rather antiquated.'

'The governors of all the colonies, with two exceptions, are aided in the discharge of their duties by an executive or privy council, composed ordinarily of a selection from the leading civil officers for the time being. According to the old form of colonial constitution still subsisting in most of the West India Islands, the "council," or "privy council," is at once the governor's council of advice, and the legislative council of the colony. But in almost all other colonies, even down to the smallest, the two bodies are distinct. The executive council is composed of a small number of the principal officials of the settlement, appointed and removable by the Crown.'

'The second estate of our colonial government, intended by

the theory of its constitution to fulfil the functions of the hereditary peerage of Great Britain, is the legislative council. This body is ordinarily nominated by the Crown, and consists of a certain number of civil functionaries and a certain number of private colonists, commonly called the "official and non-official members." As legislators, its members sit in an upper house. They can originate and reject bills, or propose amendments, except in cases of money bills.'

'The third estate, or "House of Assembly," is in those colonies to which free constitutions have been granted, simply a miniature copy (so far as its organization is concerned) of the British House of Commons. The assemblies in the older colonies were summoned by royal writ, in pursuance of commissions and instructions to the governor.'

'The constitution of these assemblies, both as to qualification of members and electors, and in other particulars, varies in the various colonies of the empire. Certain uniform features, nevertheless, attach to all. In all, the suffrages of electors are taken by a Crown officer; in all, oaths of allegiance are administered to, and the session opened by, the representative of the Crown; all elect their speaker, have power to commit for certain contempts, to control public accounts, vote supplies, impose taxes, and frame laws and ordinances. The affirmative voice of the people in the colonial assemblies may be opposed by three negatives: the first vested in the council, the second in the governor, and the third in the Crown.'

'III. Dependencies (originally obtained by conquest) for which the Crown retains the power of legislation, and which are popularly termed "crown colonies." They are now reduced in number to the following:—Gibraltar, Heligoland, Labuan, Ceylon, Mauritius, Natal, British Kaffraria, Trinidad, St. Lucia, and perhaps British Guiana, although, on account of its very peculiar institutions, it seems to hold an intermediate position.'

'In most of these dependencies, the ordinary functions of legislation are vested in councils nominated by the Crown, and constructed in the same manner as the legislative councils in representative colonies; but the Crown retains in itself the concurrent and paramount power of legislation.'

'In accordance with what has been already stated with

respect to conquered or ceded countries, their ancient laws still remain in many of our dependencies, under whichever of the three classes they may now happen to be, although, of course, as all those of the third class, and only a small portion of the other two were acquired by conquest or cession, it is in the third class that we shall find the greater proportion of the laws of other countries in force.'

'Thus the laws of Spain, Holland, and France, are still wholly or partially in force in those colonies which Great Britain has acquired from those powers. The French Code de la Martinique, for instance, in St. Lucia, and part of the feudal laws of France, affecting land in Lower Canada; also four of the five branches of the Code Napoleon in the Mauritius; the Spanish Recopilacion de las Indias in Trinidad; the Roman-Dutch law of the seven united provinces in British Guiana, the Cape of Good Hope, and Ceylon; the old Sicilian laws in Malta; and the Hindoo and Mohammedan laws in British Hindostan.'

'Although the prerogatives reserved to the parent state, in dealing with the laws passed in the dependencies, and in exercise of a general imperial control, will be considered hereafter, it may be observed in this place that the laws passed in those dependencies in which representative government exists, are generally called "acts;" the laws passed in those in which it does not exist are called "ordinances." Ordinances are simply confirmed or disallowed by the Crown; the Crown's pleasure being signified by despatch from the Secretary of State.'

'"Acts" in colonies under the ordinary constitution, are dealt with by order in council, either specially confirming them, leaving them to their operation, or disallowing them. The second is now the ordinary form, and practically amounts to confirmation, there being no instance in modern times of an Act left to its operation, and afterwards disallowed. But in parliamentary colonial constitutions this course has been considerably varied, generally by leaving the governor power to give the Crown's assent, thereby superseding the necessity of an order in council, except for the purpose of disallowing. Colonial acts and ordinances come into operation on receiving the governor's assent, unless a different period be specified therein. If the Crown disallow an act or ordinance, it be-

comes of no effect from the date of publication of such disallowance in the colony, but things done under it while in force remain valid.'

'Although we cannot enter upon a more minute examination of the history or constitution of our colonial possessions, our vast empire in India, comprising an area of more than a million square miles, requires some particular notice.'

'The British empire in India may be divided politically into three classes of territories, distinguishable by the degree of British influence and authority exercised over each.'

'I. The territories directly governed through the East India Company, either by the supreme or any of the four subordinate governments.'

'II. The territories of native princes with whom we have subsiduary or protective relations, and who are under the political supremacy of the East India Company.'

'III. The territories of states which have undertaken to accept British mediation, or are under British influence, but are not ruled directly by Great Britain.'

'The first British East India Company was formed in London in 1599, and received its charter in 1600. This charter was renewed from time to time, and early in the eighteenth century it was amalgamated with the second Company, called the English East India Company, under the title of the United East India Company, and in 1720 the Company was established at the seat of the three present presidencies, Bombay, Madras, and Calcutta. The government of these three British factories was at this time committed to a president and council appointed by the Company at each of the three stations, and its affairs were conducted by civil officers sent out from England. The wars with France and the Mogul resulted in the acquisition by this country of vast territories. Lord Clive, in 1765, effected a treaty with Sujah Dowlah, by which the Company obtained the management of the revenue, including, in fact, the entire sovereignty of the provinces of Bengal, Bahar, and Orissa. and in the same year the territories and revenues thus acquired, were guaranteed for two years (and subsequently for five more years) to the East India Company, on payment of 400,000*l.* per annum. In 1773, the Imperial Parliament first made provision for the government of British India. By statute 13 Geo. III.

c. 63, the election of the twenty-four directors of the East India Company (theretofore annual) was made for certain terms, and a governor-general and four councillors were appointed for five years to administer the whole civil and military government of Bengal, Bahar, and Orissa, and the revenues thereof, and to have a general control over the subordinate presidencies and councils of Madras and Bombay. The company was subsequently not only relieved from the annual payment of 400,000*l.*, but received pecuniary assistance from this country.'

'In 1784 (by statute 24 Geo. III. c. 25, commonly called Pitt's Act) the Crown was empowered to appoint six privy councillors as commissioners for the affairs of India—three to form a quorum, and either the Chancellor of the Exchequer or one of the Secretaries of State to be president; and by the same Act the right to recall the governor-general and to declare war are vested in the court of directors. In 1788, by statute 28 Geo. III. c. 8, the commissioners appointed by the previous Act, called the "Board of Control," were empowered to direct that the expense of raising, transporting, and maintaining such troops as might be required for the security of the British territories in the East Indies, should be defrayed out of the territorial revenues. The same Act compelled the court of directors to lay annually before Parliament an account of the revenues and disbursements of each presidency.'

'The Mysore, Mahratta, and Burmese wars brought vast accessions to the British dominions. In 1833, by statute 3 & 4 Will. IV. c. 85, the possession of the British territories in India (which had been continued from time to time by previous Acts) was confirmed to the company for a further period of twenty years; the board of commissioners for the affairs of India was remodelled, and the civil and military government vested in the governor-general and four councillors. The appointment of the governor-general was vested in the court of directors subject to the royal approval, the right of the Imperial Parliament to legislate for India being expressly reserved by this statute.'

'In 1853, by statute 16 and 17 Vict. c. 95, the possession of their territories in India was continued to the company until Parliament should otherwise provide for the same, and the

government of India remodelled in many particulars. The result of these and various other legislative provisions is, that while the government of British India is administered in England by two distinct departments,—the East India Company, as represented by the court of directors, and by the Crown as represented by the Board of Control,—the supreme local administration is vested in a governor-general and a council, now consisting of eleven members. The seat of government is at Calcutta; and it exercises a general authority over the four subordinate governments of Madras, Bombay, the north-west provinces and the straits, settlements, &c., and a direct control over all those districts of British India which are not included within any of the four. The governor-general of India is appointed by the court of directors of the East India Company, and may be recalled by them; but ordinarily, since Lord Hastings' time, holds office for five years. He is invested with supreme executive authority, which may be exercised with or without the concurrence of his council.'

'The council of India is now constituted as follows:—The governor-general, and four ordinary members, who must have been civil or military servants of the company of ten years' standing; there are also four legislative members, being civil servants of the company of ten years' standing, but entitled to vote in the framing of laws and regulations. There are also three *ex-officio* members, namely, the commander-in-chief, the chief justice, and one of the other judges of the Supreme Court of Bengal.'[v]

These are the several parts of the dominions of the Crown [110]
of Great Britain, in which the municipal laws of England are not of force or authority, merely as the municipal laws of England. Most of them have probably copied the spirit of their own law from this origin; but then it receives its obligation and authoritative force, from being the law of the country.

We come now to consider the kingdom of England in par- [111]
ticular, the direct and immediate subject of those laws, con-

[v] The increased importance of our colonial possessions having rendered it necessary to make some further mention of their government, than was considered sufficient by Sir William Blackstone, the above analysis has been introduced, for which the editor is chiefly indebted to Mr. Arthur Mills' valuable work on the Constitutions of our Dependencies.

England, including Wales and Berwick-upon-Tweed.

cerning which we are to treat in the ensuing Commentaries. And this comprehends not only Wales and Berwick, of which enough has been already said, but also part of the sea. The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shown hereafter; but they are not subject to the common law.[w] This main sea begins at the low-water mark. But between the high-water mark and the low-water mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, and alternate jurisdiction; one upon the water, when it is full sea; and the other upon land, when it is an ebb.[x]

The two modes of division.

The territory of England is liable to two divisions: the one ecclesiastical, the other civil.

1. Ecclesiastical division into provinces, dioceses, archdeaconries, rural deaneries, and parishes.

1. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops; whereof

[112]

Canterbury includes twenty, and York six.[y] Every diocese is divided into archdeaconries, whereof there are sixty in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes.[z]

Parishes.

A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein. These districts are computed to exceed ten thousand in number.[a] How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of Christianity in this island parishes were unknown, or at least signified the same that a diocese does now. There was then

[w] Co. Litt. 260.

[x] Finch. L. 78. 'The extent of the right to the shore which of common right belongs to the Crown is *primâ facie* limited landwards by the line of the medium high tide between the spring and the neap. (*Attorney-General* v. *Chambers*, 4 De Gex. Mac. and Gor. 206).'

[y] 'The province of Canterbury formerly contained twenty-one dioceses, but the sees of Gloucester and Bristol were united by statute 6 & 7 Will. IV. c. 77. The province of York formerly contained four dioceses, but by the same statute the two new bishopricks of Manchester and Ripon were formed, and made subject to the metropolitan jurisdiction of the Archbishop of York. The limits of the Ecclesiastical Courts, and their jurisdiction in matters testamentary, remain unaltered, however. (10 & 11 Vict. c. 98, ss. 3 & 4).'

[z] Co. Litt. 94.

[a] Camden's Britannia.

no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion.[b]

Camden[c] says, England was divided into parishes by Archbishop Honorius about the year 630. Sir Henry Hobart[d] lays it down, that parishes were first erected by the council of Lateran, which was held A.D. 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Selden has clearly shown,[e] that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of King Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary;* that is, every man paid his own (as was before observed) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying—and with either jealousies or mean compliances in such as were competitors for receiving them—it was now ordered by the law of King Edgar[f] that "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.*" However if any thane, or great lord, had a church within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one third of his tithes for the maintenance of the officiating minister: but if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case *all* his tithes were ordained to be paid to the *primariæ ecclesiæ,* or mother-church.[g] [113]

[b] Seld. of Tith. 9, 4; 2 Inst. 646; Hob 296.
[c] In his Britannia.
[d] Hob. 296.
[e] Of tithes, c. 9. See Kemble's Saxons in England.
[f] Seld. of Tith c. 1.
[g] Seld. of Tith. c. 2. LL. Canute, c. 11.

This proves that the kingdom was then generally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors; since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes, or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general: and this tract of land, the tithes whereof were so [114] appropriated, formed a distinct parish, which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly-erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels.

Extra-parochial places.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because 'they belonged to religious houses, or were the property of the Crown,[h] or because' they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extra-parochial; and their tithes are now by immemorial custom payable to the Crown instead of the bishop, in trust and confidence that the sovereign will distribute them for the general good of the church.[i] 'And thus much for the ecclesiastical division of this kingdom, which division it is, however, to be observed, has for some purposes

[h] Popul. Abst. 1831, v. i. p. xxii.

[i] 2 Inst. 647; 2 Rep. 44; Cro. Eliz. 512. Extra-parochial wastes and marsh lands, when improved and drained, are by the statute 17 Geo. II. c. 37, to be assessed to all parochial rates in the parish next adjoining such wastes or marsh lands.

been adopted as a civil division, particularly in the series of statutes called the Poor Laws.'

Civil division.

2. The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, is said to owe its origin to King Alfred:[j] who, to prevent the rapines and disorders which formerly prevailed in the realm, is reputed to have instituted tithings; so called from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming.[k] And therefore anciently no man was suffered to abide in England above forty days, unless he were enrolled in some tithing or decennary.[l] [115] One of the principal inhabitants of the tithing was annually appointed to preside over the rest, being called the tithing-man, the headborough (words which speak their own etymology), and in some counties the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing.[m]

Tithings, towns, or vills.

Tithings, towns, or vills, are of the same signification in law, and are said to have had, each of them, originally a church and celebration of divine service, sacraments, and burials:[n] though that seems to be rather an ecclesiastical, than a civil distinction. The word *town* or *vill* is indeed, by the alteration of times and language, now become a generic term, comprehending under it the several species of cities, boroughs, and common towns. A city is a town incorporated, which is or has been the see of a bishop: and though the bishopric be dissolved, as at Westminster, yet still it remains a city.[o] A *borough* is a town, either corporate or not, that

Cities. Boroughs.

[j] But see Hallam, Mid. Ages, vol. ii. ch. 8; Kemble's Saxons in England.

[k] Flet. 1, 47. This the laws of King Edward the Confessor, c. 20, very justly entitled, "*summa et maxima securitas, per quam omnes statu firmissimo sustinentur: quæ hoc modo fiebat, quod sub decennali fidejussione debebant esse universi,*" &c.

[l] Mirr. c. 1, § 3.

[m] Finch. L. 8.

[n] 1 Inst. 115.

[o] Co. Litt. 109. At the council, assembled in 1072, to settle the precedence between the Archbishops of Canterbury and York, it was ordered that all bishop's sees should be transferred from towns to cities. So that there was no necessary connexion between a see and a city; and indeed places in which no episcopal jurisdiction ever existed are called cities in

Towns. sends burgesses to parliament.[p] Other towns there are, which are neither cities nor boroughs; some of which have the privileges of markets and others not; but both are equally towns in law. To several of these towns there are small appendages belonging, called hamlets; which are taken notice of in the statute of Exeter,[q] which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills Sir Henry Spelman[r] conjectures to have consisted of ten freemen or frank-pledges, demi-vills of five, and hamlets of less than five. These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, to some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained originally each but one parish and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings;
[116] and, sometimes, where there is but one parish there are two or more vills or tithings.

Hamlets.

Hundreds. As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by a high constable or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes.[s]

The subdivisions of hundreds into tithings seems to be more peculiarly the invention of Alfred:[t] the institution of hundreds themselves he rather introduced than invented. For they seem to have obtained in Denmark:[u] and we find that in France a regulation of this sort was made about two hundred years before; set on foot by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in its own division. These divisions were, in that country, as well military as civil: and each contained a hundred freemen, who were subject to an officer

Domesday. The restoration of the bishopric of Ripon did not elevate that town into a city, nor had the creation of the bishopric of Manchester any such effect. Manchester is a "city" by order of the Queen in council.

[p] Litt. § 164.

[q] 14 Edw. I.

[r] Gloss. 274. See, as the latest authority on this subject, Kemble's Saxons in England.

[s] Seld. in Fortesc. c. 24.

[t] See note, p. 101.

[u] Seld. Tit. of Honour, 2, 5, 3.

called the *centenarius;* a number of which *centenarii* were themselves subject to a superior officer called the count or *comes.*[v] And indeed something like this institution of hundreds may be traced back as far as the ancient Germans, from whom were derived both the Franks who became masters of Gaul, and the Saxons who settled in England: for both the thing and the name, as a territorial assemblage of persons, from which afterwards the territory itself might probably receive its denomination, were well known to that warlike people. "*Centeni ex singulis pagis sunt idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est.*"[w]

An indefinite number of these hundreds make up a *county* **Counties.** or shire. Shire is a Saxon word signifying a division; but a county, *comitatus,* is plainly derived from *comes,* the count of the Franks; that is, the earl, or alderman (as the Saxons called him) of the shire, to whom the government of it was [117] intrusted. This he usually exercised by his deputy, still called in Latin *vice-comes,* and in English, the sheriff, shrieve, or shire-reeve, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundreds apiece. These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into *three* of these intermediate jurisdictions, they are called trithings,[x] which were anciently governed by a trithing-reeve. These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west riding. The number of counties in England and Wales have been different at different times: at present they are forty in England, and twelve in Wales.

Three of these counties, Chester, Durham, and Lancaster, **Counties palatine.** are called counties palatine. The two former are such by prescription, or immemorial custom; or, at least, as old as the Norman conquest:[y] the latter was created by King Edward III. in favour of Henry Plantagenet, first Earl and then

[v] Montesq Sp. L. 30, 17.
[w] Tacit. de Mor. Germ. 6.
[x] LL. Edw. c. 34.
[y] Seld. Tit. Honour, 2, 5, 8.

Duke of Lancaster;[z] whose heiress being married to John of Gaunt the king's son, the franchise was greatly enlarged and confirmed in parliament,[a] to honour John of Gaunt himself, whom, on the death of his father-in-law, the king had also created Duke of Lancaster.[b] Counties palatine are so called *a palatio;* because the owners thereof (the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster) had in those counties *jura regalia*, as fully as the king had it in his palace; *regalem potestatem in omnibus*, as Bracton expresses it.[c] They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace;[d] all
[118] writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis.*[e] And indeed by the ancient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried: in a court-leet, *contra pacem domini;* in the court of a corporation, *contra pacem ballivorum;* in the sheriff's court or tourn, *contra pacem vicecomitis.*[f] These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the Continent, during the weak and infant state of the first feudal kingdoms in Europe)[g] were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland: in order that the inhabitants, having justice administered at home, might not be obliged to go out of the country, and leave it open to the enemy's incursions; and that the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire; the latter now united with Northumberland: but these were abolished by parliament, the former in 27 Hen. VIII., the latter in 14 Eliz. And in 27 Hen. VIII., likewise, the powers before mentioned of owners of counties palatine were abridged; the reason for their continuance in a manner ceasing: though

[z] Pat. 25 Edw. III. p. 1, m. 18; Sandford's Gen. Hist. 112; 4 Inst. 204.

[a] Cart. 36 Edw. III. n. 9.

[b] Pat. 51 Edw. III. m. 33; Plowd. 215; 7 Rym. 138.

[c] L. 3, c. 8, § 4.

[d] *Jewison* v. *Dyson*, 9 M. & W. 540.

[e] 4 Inst. 204.

[f] Seld. in Heng. Magn. c. 2.

[g] Robertson, Ch. V. i. 60.

all writs were still witnessed in their names, and all forfeitures for treason by the common law accrued to them.[h]

Of these three, the county of Durham remained longest in the hands of a subject. 'It belonged to the Bishop of Durham for the time being, till it was vested in the Crown by the stat. 6 & 7 Will. IV. c. 9. By this statute the palatine jurisdiction and all forfeitures and *jura regalia* were transferred to the then king, his heirs and successors, but without prejudice to the jurisdiction of the courts of the county palatine, except that of the county court, which is abolished by the Act.' **Durham.**

The earldom of Chester, as Camden testifies, was united to the Crown by Henry III., and has ever since 'been one of the titles borne by the eldest son of the sovereign. By stat. 10 Geo. IV. and 1 Will. IV., c. 70, the jurisdiction of the Courts of Westminster is extended to this county palatine, and the jurisdiction of the palatine courts abolished. Justice is consequently now administered in the county of Chester, as in any other county of England.' **Chester.**

The county palatine, or duchy, of Lancaster, was the property of Henry Bolingbroke, the son of John of Gaunt, at the time when he wrested the Crown from King Richard II., and assumed the title of King Henry IV. But he was too prudent to suffer this to be united to the Crown; lest, if he [119] lost one, he should lose the other also. For, as Plowden[i] and Sir Edward Coke[j] observe, "he knew he had the duchy of Lancaster by sure and indefeasible title, but that his title to the Crown was not so assured: for that after the decease of Richard II., the right of the crown was in the heir of Lionel Duke of Clarence, *second* son of Edward III.; John of Gaunt, father to this Henry IV., being but the *fourth* son." And therefore he procured an Act of Parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered, and governed, in like manner as if he never had attained the regal dignity; and thus they descended to his son and grandson, Henry V. and Henry VI., many new territories and privileges being annexed to the duchy by the former.[k] Henry VI. being at- **Lancaster.**

[h] 4 Inst. 205. [i] 215. [j] 4 Inst. 205.
[k] Parl. 2 Hen. V. n. 30; 3 Hen. V. n. 15.

tainted in 1 Edw. IV., this duchy was declared in parliament to have become forfeited to the Crown,[l] and at the same time an Act was made to incorporate the duchy of Lancaster, to continue the county palatine (which might otherwise have determined by the attainder[m]) and to make the same parcel of the duchy: and, farther, to vest the whole in King Edward IV. and his heirs, *kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the Crown. And in 1 Hen. VII. another Act was made, to resume such part of the duchy lands as had been dismembered from it in the reign of Edward IV., and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form and condition, separate from the Crown of England and possession of the same, as the three Henries and Edward IV., or any of them, had and held the same.[n]

'The palatine courts of Durham and Lancaster exercise in personal actions a concurrent jurisdiction with the Courts at Westminster. If, however, a real action be brought in the Courts at Westminster, to recover lands in either county, the defendant may plead to the jurisdiction. By several statutes, particularly the Common Law Procedure Acts of 1852 and 1854, the procedure in the palatine courts in personal actions and ejectment, has been assimilated to that of the Superior Courts at Westminster.'

[l] 1 Ventr. 155.

[m] 1 Ventr. 157.

[n] Some have entertained an opinion (Plowd. 220, 1, 2; Lamb. *Archeion*, 233; 4 Inst. 206), that by this Act the right of the duchy vested only in the *natural*, and not in the *political* person of King Henry VII., as formerly in that of Henry IV., and was descendible to his natural heirs, independent of the succession to the Crown. And if this notion were well founded, it might have become a very curious question at the time of the Revolution in 1688, in whom the right of the duchy remained after King James's abdication, and previous to the attainder of the pretended Prince of Wales. But it is observable, that in the same Act, the duchy of Cornwall is also vested in King Henry VII. and his heirs; which could never be intended in any event to be separated from the inheritance of the Crown. And indeed it seems to have been understood very early after the statute of Henry VII., that the duchy of Lancaster was by no means thereby made a separate inheritance from the rest of the royal patrimony; since it descended with the Crown to the half-blood in the instances of Queen Mary and Queen Elizabeth; which it could not have done, as the estate of a mere duke of Lancaster, in the 'then' common course of legal descent ('which was altered in 1833'). The better opinion, therefore, seems to be that of those judges, who held (Plowd. 221), that notwithstanding the statute of Henry VII. (which was only an act of resumption) the duchy still remained as established by the Act of Edward IV.; separate from the other possessions of the Crown in order and government, but united in point of inheritance.

The Isle of Ely was not a county palatine, though sometimes erroneously called so, but only a royal franchise: the bishop having by grant of King Henry the First, *jura regalia* within the Isle of Ely; whereby he formerly exercised a jurisdiction over all causes, as well criminal as civil.[o] 'This jurisdiction was, by stat. 6 & 7 Will. IV. c. 87, vested in the Crown.' The Isle of Ely. [120]

There are also counties corporate: which are certain cities and towns, some with more, some with less territory annexed to them; to which out of special grace and favour the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs[p] and other magistrates, so that no officers of the county at large have any power to intermeddle therein.[q] Such are London, York, Bristol, Norwich, Coventry, and many others. Counties corporate.

'For certain purposes connected with the administration of justice, England and Wales have also been divided into districts, some of which comprise several counties or parts of counties, while others consist of a part of a county only. Thus for the trial and punishment of many offences which are within the jurisdiction of the justices of the peace, counties have, as we shall see afterwards, been formed into divisions for holding petty and quarter sessions. Besides the court of bankruptcy in London, which has jurisdiction in all bankruptcies occurring in a large area around the metropolis, there are seven district courts of bankruptcy, first established by stat. 1 & 2 Will. IV. c. 56, and each of which has jurisdiction within a certain district assigned to it.[r] So England and Wales (exclusive of London) have been divided into sixty districts, in which county courts are now held once a month.[s] The limits of these districts are generally assigned by order of the Queen in council, but they exist and are recognized only for the particular purpose for which they are created.' And thus much of the countries subject to the laws of England.

o 4 Inst. 220.

p See 5 & 6 Will. IV. c. 76, s. 61.

q Power is now given, however, to execute criminal process within such liberties by means of backed warrants, or, in cases of fresh pursuit, without warrant. See stat. 11 & 12 Vic. c. 42 and 43.

r 5 & 6 Vic. c. 122. Order in Council, London Gazette, 4th Nov. 1842.

s 9 & 10 Vic. c. 95, s. 2. Order in Council, Gazette, 10th March, 1847.

COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

THE objects of the laws of England are so very numerous and extensive, that in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.

Now, as municipal law is a rule of civil conduct, com- [122]
manding what is right, and prohibiting what is wrong; or as Cicero,[a] and after him our Bracton,[b] have expressed it, *sanctio justa, jubens honesta et prohibens contraria;* it follows, that the primary and principal objects of the law are RIGHTS and WRONGS. In the prosecution therefore of these Commentaries, I shall follow this very simple and obvious division; and shall in the first place consider the *rights* that are commanded,

[a] 11 Philipp. 12. [b] L. 1, c. 3.

and secondly the *wrongs* that are forbidden by the laws of England.

Rights; respect 1. persons, or 2. things.

Rights are, however, liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the *rights of persons;* or they are, secondly, such as a man may acquire over external objects or things unconnected with his person, which are styled *jura rerum*, or the *rights of things.*

Wrongs are 1. private or 2. public.

Wrongs also are divisible into, first, *private wrongs*, which, being an infringement merely of particular rights, concern individuals merely, and are called civil injuries; and secondly, *public wrongs*, which being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

The object of the laws of England falling into this fourfold division, the present Commentaries will therefore consist of the four following parts:—1. *The rights of persons;* with the means whereby such rights may be either acquired or lost. 2. *The rights of things;* with the means also of acquiring and losing them. 3. *Private wrongs*, or civil injuries; with the means of redressing them by law. 4. *Public wrongs*, or crimes and misdemeanors; with the means of prevention and punishment.

1. Rights of persons.

We are now, first, to consider the *rights of persons;* with the means of acquiring and losing them.

[123] Now the rights of persons that are commanded to be observed by the municipal law are of two sorts: first, such as are due *from* every citizen, which are usually called civil *duties;* and, secondly, such as belong to him, which is the more popular acceptation of *rights* or *jura*. Both may indeed be comprised in this latter division; for, as all social duties are of relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. But I apprehend it will be more clear and easy, to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate, and yet they are, reciprocally, the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

Rights of persons, absolute or relative.

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

Absolute rights.

By the absolute *rights* of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*, which man is bound to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all ex- [124] plain or enforce them; for the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man, therefore, be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by our laws; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as well as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without the mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human law is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which
[125] in themselves are few and simple; and then such rights as are relative, which, arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which

is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.[c] Hence we may collect that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence. Thus the statute of King Edward IV.,[d] which forbad the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of King Charles II.,[e] which prescribed a thing seemingly as indifferent (a dress for the dead, who were all ordered to be buried in woollen), was a law (in the circumstances) consistent with public liberty; for it encouraged the then staple trade of the country, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Locke has well observed)[f] where there is no law there is no freedom. But then, on the other hand, that constitution or frame of govern-

Political or civil liberty.

[126]

[c] *Facultas ejus, quod cuique facere libet, nisi quid vi aut jure prohibetur.* Inst. i. 3, 1.

[d] 3 Edw. IV. c. 5.

[e] 30 Car. II. st. 1, c. 3, repealed by 54 Geo. III. c. 108.

[f] On Gov. 2, § 57.

ment, that system of laws is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it [127] falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very differently from the modern constitutions of other states on the continent of Europe, and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave, the moment he lands in England,[g] ('or even puts his foot on board a British man-of-war on the high seas,'[h]) falls under the protection of the laws, and becomes a free man.[i]

On the English liberties.

The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties), as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

On the Charters of our Liberties.

First, by the Great Charter of Liberties, which was obtained, sword in hand, from King John, and afterwards, with

[g] Case of the negro *Somerset*, xx. St. Tr. 79.

[h] *Forbes* v. *Cochrane*, 2 B & C. 448.

[i] Salk. 666. See ch. 14.

some alterations, confirmed in parliament by King Henry the Third, his son. Which charter contained very few new grants; but, as Sir Edward Coke[j] observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *confirmatio cartarum*,[k] whereby the Great Charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a-year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two[l]), from the first Edward to Henry the Fourth. Then, after a long interval, by the *Petition of Right;* which was a parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *Habeas Corpus* Act, passed under Charles the Second. To these succeeded the *Bill of Rights*, or declaration delivered by the lords and commons to the Prince and Princess of Orange, 13th February 1688; and afterwards enacted in parliament when they became king and queen: which declaration concludes in these remarkable words: "And they do claim, demand, and insist upon, all and singular the premises, as their undoubted rights and liberties." And the Act of Parliament itself[m] recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient, and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the last century, in the *Act of Settlement*,[n] whereby the Crown was limited to Her present Majesty's illustrious house: and some new provisions were added, at the same fortunate æra, for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people [128]

[j] 2 Inst. proœm. [k] 25 Edw. I. [l] 2 Inst. proœm.
[m] 1 W. & M. st. 2, c. 2. [n] 12 & 13 Will. III. c. 2.

of England," according to the ancient doctrine of the common law.[o]

[129] Thus much for the *declaration* of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society has engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: because, as there is no other known method of compulsion, or of abridging man's natural free-will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. Right of personal security.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, kills it in her womb; or, if any one beat her, whereby the child dies in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter;[p] 'and now, by statute, trying to

[o] Plowd. 55.

[p] "*Si sit aliquis qui mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam: si puerperium jam formatum vel animatum fuerit, et maxime si fuerit animatum, facit homicidium.*" Bracton, l. 3, tr. 2, c. 4.

procure abortion is a felony punishable with transportation [130]
for life.'[q]

An infant in *ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it;[r] and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born.[s] And in this point the civil law agrees with ours.[t]

2. Limbs.

2. A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural, inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance.[u] And the same is also a sufficient excuse for the commission of many misdemeanors, as will appear in the fourth book of these Commentaries. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities*, of
which there are two sorts; duress of imprisonment, where a [131]
man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now dis-

[q] 7 Will. IV. and 1 Vict. c. 85; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99, s. 3.

[r] Stat. 12 Car. II. c. 24.

[s] Stat. 10 & 11 Will. III. c. 16.

[t] *Qui in utero sunt, in toto pæne jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur.* Ff. 1, 5, 26.

[u] 2 Inst. 483.

Duress. coursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "*non*," as Bracton expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum.*"[v] A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages:[w] but no suitable atonement can be made for the loss of life or limb. And the indulgence shown to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law; *ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit.*[x]

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessaries of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the Emperor Constantine commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprised in the Theodosian code,[y] were rejected in Justinian's collection.

[132] These rights, of life and member, can only be determined by the death of the person; which was formerly accounted to

On civil death. be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm[z] by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk pro-

[v] L. 2, c. 5.

[w] 2 Inst. 483.

[x] Ff. 48, 21, 1.

[y] L. 11, t. 27.

[z] Co. Litt. 133. If a man is, by Act of Parliament, attainted of treason or felony, and saving his life is banished for ever, this is a civil death.

fessed: in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society; and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magisstate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations.[a] A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts, due *to* the religious, and were liable to the same actions for those due *from* him, as if he were naturally deceased.[b] Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due.[c] In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion: for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's *natural* life.[d] But, even in the times of popery, the law of England took no [133] cognizance of *profession* in any foreign country, because the fact could not be tried in our courts;[e] and therefore, since the Reformation, this disability is held to be abolished:[f] as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I. c. 28.

This natural life, being, as was before observed, the imme-

[a] This was also a rule in the feudal law, l. 2, t. 21, *desiit esse miles seculi, qui factus est miles Christi, nec beneficium pertinet ad eum qui non debet gerere officium.*

[b] Litt. § 200.

[c] Co. Litt. 133.

[d] 2 Rep. 48; Co. Litt. 132.

[e] Co. Litt. 132.

[f] 1 Salk. 162.

diate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments. Whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subjects, such constitution is in the highest degree tyrannical: and whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree: because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The law of England now very seldom inflicts any punishment extending to life, unless upon the highest necessity:[g] and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo,*" says the Great Charter, "*aliquo modo destruatur, nisi per legale judicium parium suorum, aut per legem terræ.*" Which words, "*aliquo modo destruatur,*" according to Sir Edward Coke,[h] include a prohibition not only of *killing and maiming*, but also of *torturing* (to which our laws are strangers), and of every oppression by colour of an illegal authority. And it is enacted by the statute 5 Ed. III. c. 9, that no man shall be forejudged
[134] of life or limb, contrary to the Great Charter and the law of the land: and again, by statute 28 Ed. III. c. 3, that no man shall be put to death, without being brought to answer by due process of law.

3. Body. 3. Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces,

g 'In the time of Sir William Blackstone, the common law inflicted death on every felon who could not read; a death which was escaped by praying "the benefit of clergy." The numerous Acts of Parliament, creating felonies without benefit of clergy, show that the statute law was still more sanguinary; since of one hundred and sixty offences then punishable with death, four-fifths had been made so during the reigns of Geo. I., Geo. II., and Geo. III. See *post*, vol. iv. ch. 28.'

h 2 Inst. 48.

assaults, beating, and wounding; though such insults amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and, **4. Health.**

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned among the rights of persons, referring the more minute discussion of their several branches to the third volume of these Commentaries, which treats of the infringement of these rights, under the head of personal wrongs. **5. Reputation.**

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the Great Charter is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes[1] expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the Petition of Right, 3 Car. I. it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in **II. Right of personal liberty.** [135] **Habeas corpus.**

[1] 5 Edw. III. c. 8; 25 Edw. III. st. 5, c. 4; 28 Edw. III. c. 3.

person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the *Habeas Corpus Act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this Act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2, c. 2, that excessive bail ought not to be required.

The Habeas Corpus Act.

Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomsoever he or his officers thought proper, there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life or property, at the arbitrary
[136] will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet, sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the Crown, by suspending the *Habeas Corpus Act* for a short and limited time, to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate

Suspension of the habeas corpus act.

which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica detrimenti capiat,*" was called the *senatus consultum ultimæ necessitatis.* In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever.[j]

The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, arresting or forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment,* which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure [137] his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus.* If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect, says Sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven

[j] 'The Crown is not authorized during a suspension of the Habeas Corpus Act, to imprison suspected persons without assigning any reason. The effect of a suspension of the Habeas Corpus Act is to prevent persons who are committed upon certain charges from being bailed, tried, or discharged during the time of the suspension. The magistrate, or other person, who has granted the warrant of commitment, remains liable for all the consequences of the illegal imprisonment of the person detained, if it has been illegal. When the Habeas Corpus Act has been suspended, acts of indemnity have accordingly been passed subsequently. for the protection of those who could not defend themselves in an action for false imprisonment, though it may have seemed to be justified by the necessity of the moment. As instances of such acts, see 57 Geo. III. cc. 3, 55; 58 Geo. III. c. 6.'

from it unless by the sentence of the law. The sovereign indeed, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without licence. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no, not even a criminal. For exile, and transportation, are punishments unknown to the common law; and whenever the latter is inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern Act of Parliament.[k] To this purpose the Great Charter declares that no freeman shall be banished unless by the judgment of his peers, or by the law of the land. And by the *Habeas Corpus Act*, 31 Car. II. c. 2 (that second *Magna Charta* and stable bulwark of our liberties), it is enacted that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the
[138] seas (where they cannot have the full benefit and protection of the common law); but that all such imprisonment shall be illegal; that the person who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers, and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

Punishment by transportation.

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the sovereign may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an excep-

[k] Exile was first introduced as a punishment in the reign of Queen Elizabeth, when it was enacted that "such rogues as were dangerous to the inferior people should be banished the realm." (39 Eliz. c. 4.) The first statute in which the word "transportation" is used is 18 Car. II. c. 3, which gives a power to the judges at their discretion either to execute or transport to America for life the Moss-troopers of Cumberland and Northumberland. See further as to transportation, vol. iv. ch. 28.

tion: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador.[l] For this might in reality be no more than an honourable exile.

III. Rights to private property.

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The origin of private property is probably founded in nature, as will be more fully explained in the second book of these Commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society: and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the Great Charter has declared that no freeman shall be disseised, or divested, of his freehold or of his liberties, or free customs, but by the judgment of his peers, or by the law [139] of the land. And by a variety of ancient statutes[m] it is enacted that no man's lands or goods shall be seised into the king's hands, against the Great Charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed, and holden for none.

Infringements of this right.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous

[l] 2 Inst. 47. [m] 5 Edw. III. c. 9; 25 Edw. III. st. 5, c. 4; 28 Edw III. c. 3.

to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[n]

[110] Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any taxes, even for the defence of the realm, or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I. cc. 5 and 6, it is provided, that the king shall not take any aids or tasks but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4, c. 1, which enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land:[o] and again, by 14 Edw. III. st. 2, c. 1, the prelates, earls, barons, and commons, citizens, burgesses, and merchants shall not be charged

[n] 'In acts for making railways, canals, &c. &c., it is now usual to incorporate "The Lands Clauses Consolidation Act" (8 Vic. c. 18), which is the statute, under which compensation is assessed, for property or private rights taken away or injuriously affected by undertakings of a public nature. As to making new roads, or stopping or diverting highways, the legislature has vested an extensive jurisdiction in these matters in the courts of quarter sessions.' (5 & 6 Will. IV. c. 50.)

[o] See the historical introduction to the great charter (*edit. Oxon.*) *sub anno* 1297; wherein it is shown that this statute *de tallagio non concedendo* (34 Edw. I.), is in reality nothing more than a sort of translation into Latin of the *confirmatio cartarum*, 25 Edw. I., which was originally published in the Norman language.

to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the Petition of Right (3 Car. I.), that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by Act of Parliament. And, lastly, by the statute 1 W. & M. st. 2, c. 2, it is declared, that levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, or for longer time, or in other manner, than the same is or shall be granted, is illegal.

Securities for the perpetual enjoyment of these rights.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other [141] auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

1. The constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter.

2. The limitation of the royal prerogative, by bounds, so certain and notorious, that it is impossible the sovereign should either mistake or legally exceed them without the consent of the people. Of this also I shall treat in its proper place. The former of these keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws that are framed and established by the other.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered

therein. The emphatical words of *Magna Charta*, spoken in the person of the king, who in judgment of law (says Sir Edward Coke)[p] is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam:* "and, therefore every subject," continues the same learned author, "for injury done to him, *in bonis, in terris, vel persona,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the *affirmative* Acts of Parliament, [142] wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows, or may know if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall however just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *Magna Charta*, that no freeman shall be outlawed, that is put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8, and 11 Rich. II. c. 10, it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III. st. 4. And by 1 W. & M. st. 2, c. 2, it is declared, that the power of suspending, or dispensing with laws, or the execution of laws, by regal authority (a power which the princes of the house of Stuart pretended they possessed), without consent of parliament, is illegal.[q]

Not only the substantial part, or judicial decisions, of the

[p] 2 Inst. 55.

[q] 'Shortly before the Revolution, eleven of the twelve judges held that the king could dispense with the Test Act, imposing penalties for accepting offices without the previous qualification of having received the sacrament in the church of England. They further held that this power was a branch of the king's sovereign prerogative, which could not be taken away or restrained by statute. (*Hale's* case, 11 St. Tr. 1165-1280; 2 Show. 475.) See further as to the *Dispensing power*, Hallam's Con. Hist. of England, vol. viii. ch. 14.'

law, but also the formal part or method of proceeding, cannot be altered but by parliament: for if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The sovereign, it is true, may erect new courts of justice: but then they must proceed according to the old-established forms of the common law. For which reason it is declared in the statute 16 Car. I. c. 10, upon the dissolution of the court of star-chamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority, by English bill, petition, articles, libel (which were the course of proceeding in the star-chamber, borrowed from the civil law), or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law.*

4. If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the sovereign, or either house of parliament, for the redress of grievances. In Russia we are told[r] that the Czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition: and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult;[s] for under these regulations it is declared by the [143]

[r] Montesq. Sp. L. xii. 26.

[s] To prevent the repetition of such a riot as happened in the opening of the memorable parliament in 1640, it is provided by the statute 13 Car. II. st. 1, c. 5, that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury, in the

statute 1 W. & M. st. 2, c. 2, that the subject has a right to petition; and that all commitments and prosecutions for such petitioning are illegal.[t]

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as
[144] are allowed by law; which is also declared by the same statute 1 W. & M. st. 2, c. 2, and is indeed a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[u]

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties, more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded, should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have, seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the

country; and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. 'The punishment for an offence against the act, is a fine (not exceeding 100*l*.), and imprisonment for three months. At the trial of Lord George Gordon (Doug. 571), the whole court, including Lord Mansfield, declared that this statute was not affected by the Bill of Rights; but Mr. Dunning, in the House of Commons, contended for a contrary view, saying that, "To argue that the act of Charles was now in force, would be as absurd as to pretend that the prerogative of the Crown still remained in its full extent notwithstanding the declaration in the Bill of Rights." (An. Reg. 1781.) This argument is one which it seems difficult to answer.'

[t] 'Every right is capable of being, and this one may, in the opinion of some statesmen, have been abused: hence the act for suppressing societies established for seditious or treasonable purposes (39 Geo. III. c. 79). Meetings, it may be added, of more than fifty persons for the purpose of petitioning the parliament, held within one mile of Westminster Hall, are still illegal (57 Geo. III. c. 19, s. 23), but this law has been in practice entirely disregarded of late years.'

[u] 'The stat. 60 Geo. III. c. 1, passed to prevent the training of persons to the use of arms, and authorizing two justices to seize arms which they believe to be in the possession of any persons for dangerous purposes, may be considered as an act to prevent the abuse of the right, not to restrict or destroy the right itself.'

subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative. And lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the sovereign and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints—restraints in themselves so gentle and moderate, as will appear upon farther inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do everything that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow-citizens. So that this review of our situation may fully justify the observation of a learned French author, who indeed generally [145] both thought and wrote in the spirit of genuine freedom;[v] and who has not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world where political or civil liberty is the direct end of its constitution. Recommending therefore to the students in our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous Father Paul to his country, "ESTO PERPETUA!"

[v] Montesq. Sp. L. xi. 5.

CHAPTER II.

OF THE PARLIAMENT.

[146] We are next to treat of the rights and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private: and we will first consider those that are public.

The most universal public relation, by which men are connected together, is that of government, namely, as governors and governed, or, in other words, as magistrates and people. Of magistrates some also are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

In all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us therefore in England this supreme power is divided
[147] into two branches; the one legislative, to wit, the Parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British Parliament; in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.

Origin of Parliaments.

The origin or first institution of Parliament is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word *Parliament*, itself (*parlement* or *colloquium*, as some of our historians translate it), is comparatively of modern date; derived from the French, and signifying an assembly that met and conferred together. It was first applied to general assemblies of the states under Louis VII. in France, about the middle of the twelfth century.[a] But it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm: a practice which seems to have been universal among the northern nations, particularly the Germans;[b] and carried by them into all the countries of Europe, which they overran at the dissolution of the Roman empire. Relics of which constitution, under various modifications and changes, are still to be met with in the diets of Germany and Sweden, and 'up to the Revolution of 1789 in' the assembly of the Estates in France.[c]

With us in England this general council has been held immemorially, under the several names of *micel-synoth* or great council, *micel-gemote* or great meeting, and more frequently *witena-gemote* or the meeting of wise men.[d] It was [148] also styled in Latin, *commune concilium regni*, *magnum concilium regis*, *curia magna*, *conventus magnatum vel procerum*, *assisa generalis*, and sometimes *communitas regni Angliæ*.[e] We

[a] Mod. Un. Hist. xxiii. 307. The first mention of it in our statute law is in the preamble to the statute of West. 1, 3 Edw. I. A.D. 1275.

[b] *De minoribus rebus principes consultant, de majoribus omnes.* Tac. de Mor. Germ. c. 11.

[c] The last meeting of the "Etats Généraux" of France was on the 5th of May, 1789. They had not met for a period of one hundred and seventy-five years. They afterwards resolved themselves into the "Assemblée Nationale." The "Etats Généraux," which corresponded to our Parliament, were very different bodies, however, from the Parliaments of France, for what was there called the Parliament was only the supreme court of justice, consisting of the peers, certain dignified ecclesiastics, and judges; which neither was in practice, nor was supposed to be in theory, a general council of the realm. These Parliaments were the repositories of the laws of France, and the only check upon the arbitrary edicts of the Crown, which they might refuse to register as laws. They received their deathblow from Mirabeau in the beginning of the French revolution.

[d] See Turner's Ang. Sax. b. 8, cc. 4 & 5; Hallam's Mid. Ag. ch. viii.; Kemble's Saxons in England, vol. ii. p. 182; and Palgrave's Rise and Progress of the English Commonwealth, vol. ii., pp. 225, 385.

[e] Glanvil. l. 13, c. 32; l. 9, c. 10; Pref. 9 Rep.; 2 Inst. 526.

have instances of its meeting to order the affairs of the kingdom, to make new laws, and to amend the old, or, as Fleta[f] expresses it, "*novis injuriis emersis nova constituere remedia,*" so early as the reign of Ina king of the West Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the heptarchy. And, after their union, the Mirror[g] informs us, that king Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the king with the advice of his witena-gemote or wise men, as, "*hæc sunt instituta, quæ Edgarus rex consilio sapientum suorum instituit;*" or to be enacted by those sages with the advice of the king, "*hæc sunt judicia, quæ sapientes consilio regis Ethelstani instituerunt;*" or lastly, to be enacted by them both together, as, "*hæc sunt institutiones, quas rex Edmundus et episcopi sui cum sapientibus suis instituerunt.*"

There is also no doubt but these great councils were occasionally held under the first princes of the Norman line. Glanvil, who wrote in the reign of Henry the Second, speaking of the particular amount of an amercement in the sheriff's court, says, it had never been yet ascertained by the general assize, or assembly, but was left to the custom of particular counties.[h] Here the general assize is spoken of as a meeting well known, and its statutes or decisions are put in a manifest
[149] contradistinction to custom, or the common law. And in Edward the Third's time an Act of Parliament, made in the reign of William the Conqueror, was pleaded in the case of the abbey of St. Edmund's-bury, and judicially allowed by the court.[i]

Hence it indisputably appears, that Parliaments, or general councils, are coeval with the kingdom itself. How those Parliaments were constituted and composed is another question,

f L. 2, c. 2.

g C. 1, s. 3.

h *Quanta esse debeat per nullam assisam generalem determinatum est, sed pro consuetudine singulorum comitatuum debetur*, l. 9, c. 10.

i Year-book, 21 Edw. III. 60.

which has been matter of great dispute among our learned antiquaries; and particularly, whether the commons were summoned at all; or if summoned, at what period they began to form a distinct assembly.[j] But it is not my intention here to enter into controversies of this sort. I hold it sufficient that it is generally agreed, that in the main the constitution of Parliament, as it now stands, was marked out so long ago as the seventeenth year of King John, A.D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the Crown, by the sheriff and bailiffs, to meet at a certain place, with forty days' notice, to assess aids and scutages when necessary. And this constitution has subsisted in fact at least from the year 1266, 49 Hen. III., there being still extant writs of that date, to summon knights, citizens, and burgesses to Parliament. I proceed therefore to inquire wherein consists this constitution of Parliament, as it now stands, and has stood for the space of at least five hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of its assembling; secondly, its constituent parts; thirdly, the laws and customs relating to Parliament, considered as one aggregate body; fourthly and fifthly, the laws and customs relating to each house separately and distinctly taken; sixthly, the method of proceeding, and of making statutes, in both houses; and lastly, the manner of the Parliament's adjournment, prorogation, and dissolution.

I. As to the manner and time of assembling. The Parliament is regularly to be summoned by the Sovereign's writ or letter, issued out of Chancery by advice of the privy council, at least thirty-five days before it begins to sit.[k] It is a branch of the royal prerogative, that no Parliament can be convened by its own authority, or by the authority of any, except the sovereign alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting, [150] I. Of the manner and time of assembling.

[j] Hallam, Mid. Ag. vol. iii. ch. 13.

[k] 15 & 16 Vict. c. 23.

and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the Parliament should be called together at a determinate time and place: and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts; and of the three constituent parts, this office can only appertain to the sovereign; as this is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no Parliament is in being.[1] Nor is it an exception to this rule that, by some modern statutes, on the demise of the sovereign, if there be then no Parliament in being, the last Parliament revives, and is to sit again for six months, unless dissolved by the successor: for this revived Parliament must have been originally summoned by the Crown.

[151] It is true, that by a statute, 16 Car. I. c. 1, it was enacted, that, if the king neglected to call a Parliament for three years, the peers might assemble and issue out writs for choosing one; and, in case of neglect of the peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences I have just now stated; and the act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. II. c. 1. From thence therefore no precedent can be drawn.

It is also true that the Convention-Parliament, which restored King Charles the Second, met above a month before his return; the lords by their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of Parliament: and that the

[1] By motives somewhat similar to these the republic of Venice was actuated, when, towards the end of the seventh century, it abolished the tribunes of the people, who were annually chosen by the several districts of the Venetian territory, and constituted a doge in their stead, in whom the executive power of the state was to reside. For which their historians have assigned these as the principal reasons: 1. The propriety of having the executive power a part of the legislative, or senate; to which the former annual magistrates were not admitted. 2. The necessity of having a single person to convoke the great council when separated. (Mod. Un. Hist. xxvii. 15.)

said Parliament sat till the twenty-ninth of December, full seven months after the Restoration; and enacted many laws, several of which are still in force. But this was from the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return was to pass an Act declaring this to be a good Parliament, notwithstanding the defect of the king's writs.[m] So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the Crown. Besides, we should also remember, that it was at that time a great doubt among the lawyers,[n] whether even this healing Act made it a good Parliament, and held by very many in the negative; though it seems to have been too nice a scruple. And yet, out of abundant caution, it was thought necessary to confirm its acts in the next Parliament, by statute 13 Car. II. c. 7, and c. 14.

It is likewise true, that at the time of the Revolution, [152]
A.D. 1688, the lords and commons, by their own authority, and upon the summons of the Prince of Orange (afterwards King William), met in a convention, and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that King James the Second had abdicated the government, and that the throne was thereby vacant; which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And, in such a case as the palpable vacancy of a throne, it follows, *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no Parliament can ever meet again. For, let us put another possible case, and suppose, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne: in this situation it seems reasonable to presume, that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government, otherwise there must

[m] Stat. 12 Car. II. c. 1.

[n] 1 Sid. 1.

be no government at all. And upon this and no other principle did the convention in 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant; but, the throne being previously vacant by the king's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by statute 1 W. & M. st. 1, c. 1, that this convention was really the two houses of Parliament, notwithstanding the want of writs or other defects of form. So that, notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity (and each of which, by the way, induced a revolution in the government), the rule laid down is in general certain, that the sovereign, only, can convoke a Parliament.

[153] And this by the ancient statutes of the realm[o] he is bound to do every year, or oftener, if need be. Not that he is, or ever was, obliged by these statutes to call a *new* parliament every year; but only to permit a parliament to sit annually for the redress of grievances, and dispatch of business, *if need be*, 'a necessity which now cannot but arise annually, since the supplies are voted only for one year at a time, and the Mutiny Acts are passed for one year only.'[p] Such of our monarchs as were inclined to govern without parliaments, neglected the convoking them sometimes for a very considerable period, under pretence that there was no need of them. But to remedy this, the statute 16 Car. II. c. 1, enacted, that the sitting and holding of parliaments should not be intermitted above three years at the most. And by the statute 1 Wm. & M. st. 2, c. 2, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held *frequently*; which indefinite "*frequently*" was reduced to a certainty by the statute 6 W. & M. c. 2, which enacts, as the statute of Charles the Second had done

[o] 4 Edw. III. c. 14; 36 Edw. III. c. 10.
[p] Hallam, Const. Hist. vol. iii. ch. 15.

before, that a new parliament shall be called within three years after the determination of the former; 'which period of three years has been extended to seven years by the statute 1 Geo. I. st. 2, c. 38.'[q]

II. Constituent parts of Parliament.

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the sovereign sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal (who sit, together with their sovereign, in one house), and the commons, who sit by themselves in another. And the sovereign and these three estates together, form the great corporation or body politic of the kingdom,[r] of which the Crown is said to be *caput, principium et finis.* For upon their coming together, the sovereign meets them, either in person or by representatives: without which there can be no beginning of a parliament:[s] and the Crown also has alone the power of dissolving them.

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the First, while it acted in a constitutional manner with the royal concurrence, redressed many heavy grievances, and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder, therefore, any such encroachments, the sovereign is a necessary part of the Parliament: and, as this is the reason of his being so, very properly, therefore, the share of the legis- [154]

[q] Hallam, Const. Hist. vol. iii. ch. 16.

[r] 4 Inst. 1, 2; stat. 1 Eliz. c. 3; Hale, of Parl. 1. [s] 4 Inst. 6.

lation, which the constitution has placed in the Crown, consists in the power of *rejecting* rather than *resolving;* this being sufficient to answer the end proposed. For we may apply to the royal negative in this instance, what Cicero observes of the negative of the Roman tribunes, that the Crown has not any power of *doing* wrong, but merely of *preventing* wrong from being done.[t] The Crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative, therefore, cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein, indeed, consists the true excellence of the English government, that all the parts of it form a mutual check upon
[155] each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved: while the sovereign is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not, indeed, of the sovereign,[u] which would destroy his constitutional independence; but, what is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the Crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction

[t] *Sulla—tribunis plebis suâ lege injuriæ faciendæ potestatem ademit, auxilii ferendi reliquit.* De LL. 3, 9.

[u] Stat. 12 Car. II. c. 30.

which constitutes the true line of liberty and happiness of the community.

Let us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The queen's majesty will be the subject of the next, and many subsequent chapters, to which we must at present refer. The sovereign.

The next in order are the spiritual lords. These 'now' consist of the two Archbishops of York and Canterbury, the Bishops of London, Durham, and Winchester, and twenty-three other bishops of dioceses in England, according to their priority in consecration;[v] and the archbishop and three bishops for Ireland, who sit in Parliament by rotation.[w] All these are supposed to hold certain ancient baronies [x] under the Crown: for William the Conqueror thought proper to change the spiritual tenure of frank-almoign, or free alms, under which the bishops held their lands during the Saxon government, into the feudal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt:[y] and, in right of succession to those baronies, which were inalienable from their respective dignities, the bishops and abbots were allowed their seats in the House of Lords.[z] But though these lords spiritual are in the eye of the law a distinct estate from the lords temporal, and are so distinguished in most of our Acts of Parliament, yet in practice they are usually blended together under the one name of *the lords;* they intermix in their votes; and the majority of such intermixture joins both estates.[a] The spiritual lords. [156]

[v] 6 & 7 Will. IV. c. 77; 3 & 4 Vict. c. 113; 13 & 14 Vict. c. 94.

[w] 39 & 40 Geo. III. c. 67.

[x] 'At the dissolution of the monasteries by Henry VIII. the spiritual lords included twenty-six mitred abbots and two priors (Seld. tit. hon. 2, 5, 27), a very considerable body, and in these times equal in number to the temporal nobility (Co. Litt. 97). They composed more than a third part of the House of Lords; and although their number varied considerably in different Parliaments, they always, joined to the twenty-one bishops, preponderated over the temporal peers.' (Hallam, Const. Hist. v. i., ch. 2)

[y] Gilb. Hist. Exch. 55; Spelm. W. I. 291.

[z] Glanv. 7, 1; Co. Litt. 97; Seld. tit. hon. 2, 5, 19.

[a] From this want of a separate assembly and separate negative of the prelates, some writers have argued (Whitelocke on Parl. c. 72; Warburt. Allience, b. 2, c. 3) very cogently, that the lords spiritual and temporal are now in reality only one estate (Dyer, 60); which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues: for if a bill should pass their house there is no doubt of its validity, though every lord spiritual should vote against it. Selden gives an instance (Baronage, p. 1, c. 6) in the Act of Uniformity (1 Eliz. c. 2), which was passed with the dissent of all the

The temporal lords.

[157]

The *lords temporal* consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of Parliament)[b] by whatever title of nobility distinguished; dukes, marquisses, earls, viscounts, or barons; of which dignities we shall speak more hereafter. Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland, by election, which is the case with the sixteen peers, who represent the body of the Scots nobility 'for the Parliament for which they are elected; and, since the union with Ireland, with the twenty-eight representative peers, who are elected for life, to represent the Irish nobility. The number of *lords temporal*' is indefinite, and may be increased at will by the power of the Crown, 'by the creation of peers of the United Kingdom.' Once, in the reign of Queen Anne, there was an instance of creating no less than twelve together; in contemplation of which, in the reign of King George the First, a bill passed the House of Lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the constitution, by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new-created lords. But the bill was ill relished, and miscarried in the House of Commons, whose leading members were then desirous to keep the avenues to the other house as open and easy as possible. 'The Reform Act of 1832 was only carried in the preconcerted absence of the peers opposed to it, in consequence of an intimation that the king was prepared to create, if necessary, a sufficient number of peers to outvote them.'[c]

bishops (Gibs. Codex, 286), and therefore the style of *lords spiritual* is omitted throughout the whole: and Sir Edward Coke gives many instances (2 Inst. 585, 6, 7). It was holden by the judges (7 Hen. VIII.), that the king may hold a Parliament without any spiritual lords (1 Keilw. 184). This was also exemplified, in fact, in the two first Parliaments of Charles II., wherein no bishops were summoned till after the repeal of the statute 16 Car. I. c. 27, by statute 13 Car. II. st. 1, c. 2. On the other hand, it would probably be equally good if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill; though Sir Edward Coke seems to doubt whether this would not be an *Ordinance*, rather than an *Act*, of Parliament. (4 Inst. 25.)

[b] Staunford, P. C. 153; 2 Salk. 135.

[c] 'The arguments for and against a limitation of the number of the peerage, or, practically, a restriction of the power of the Crown to create peers, are fully stated by Mr. Hallam, Const. Hist. vol. iii. ch. 16.'

The distinction of rank and honour is necessary in every well-governed state: in order to reward such as are eminent for their services to the public, in a manner the most desirable to individuals, and yet without burden to the community; exciting thereby an ambitious yet laudable ardour, and generous emulation in others. And emulation, or virtuous ambition, is a spring of action, which, however dangerous or invidious in a mere republic or under a despotic sway, will certainly be attended with good effects under a free monarchy; where, without destroying its existence, its excesses may be continually restrained by that superior power from which all honour is derived. Such a spirit, when nationally diffused, gives life and vigour to the community; it sets all the wheels of government in motion, which, under a wise regulator, may [158] be directed to any beneficial purpose; and thereby every individual may be made subservient to the public good, while he principally means to promote his own particular views. A body of nobility is also more peculiarly necessary in our mixed and compounded constitution, in order to support the rights of both the Crown and the people, by forming a barrier to withstand the encroachments of both. It creates and preserves that gradual scale of dignity which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government; for when the departure is sudden from one extreme to another, we may pronounce that state to be precarious. The nobility, therefore, are the pillars, which are reared from among the people more immediately to support the throne; and, if that falls, they must also be buried under its ruins. Accordingly, when in the last century the Commons had determined to extirpate monarchy, they also voted the House of Lords to be useless and dangerous. And since titles of nobility are thus expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. 'Their independence alike of the Crown and of the people is secured by their hereditary character; for it is essential, in order to be a peer of Parliament, that the peerage should be hereditary.[d] The lords form

[d] *Wensleydale* Peerage, Sess. 1855-56.

also a separate branch of the legislature, for if they' were confounded with the mass of the people, and like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is therefore highly necessary that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the Commons.[e]

The commons. The Commons consist of all such men of property in the kingdom, as have not seats in the House of Lords; every one of whom has a voice in Parliament, either personally or by his representatives. In a free state, every man who is supposed a free agent, ought to be in some measure his own governor; and, therefore, a branch, at least, of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small, and its citizens easily known, should be exercised by the people in
[159] their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly, which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours, it is, therefore, very wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, where all the voters are, or easily may be, distinguished. The counties are therefore represented by knights

[e] Much valuable information as to the origin, rights, and constitution of the Peerage, is collected in the four "Reports of the Committee appointed by the Lords to report on the Dignity of a Peer of the Realm," printed in 1826. The errors and misconceptions into which the Committee fell, or were led, were exposed by the late Mr. Allen, in an able criticism of these reports, in vol. xxxv. of the Edinburgh Review.

elected by the proprietors 'and occupiers' of lands; and the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest of the nation. The number of English representatives is 497, of Scots 53, and of Irish 105; in all 655.[f] And every member, though chosen by one particular district when elected and returned, serves for the whole realm. For the end of his coming thither is not particular, but general: not barely to advantage his constituents, but the *common* wealth; to advise his sovereign (as appears from the writ of summons)[g] "*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, et defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus.*" And, therefore, he is not bound to consult with, or take the advice of his constituents upon any particular point, unless he himself thinks it proper or prudent so to do.

These are the constituent parts of a parliament; the queen, the lords spiritual and temporal, and the commons. Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in times of madness and anarchy, the commons once passed a vote,[h] "that whatever is enacted or declared for law by the Commons in Parliament assembled hath the force of law; and as the people of this nation are concluded thereby, although the consent and concurrence of the king or House of Peers be not had thereto:" yet when the constitution was restored in all its forms, it was particularly enacted by statute 13 Car. II. c. 1, that if any person shall maliciously or advisedly affirm, that both or either of the Houses of Parliament have any legislative authority without the king, such person shall incur all the penalties of a *præmunire*. [160]

[f] 'The number of representatives for England and Wales is 500, *viz.* 158 for counties and 342 for boroughs (2 & 3 Will. IV. c. 45). But the boroughs of Sudbury and St. Albans having been disfranchised for bribery (7 & 8 Vict. c. 53; 15 & 16 Vict. c. 9), the number is now 497. The number of representatives for Scotland is 53, *viz.* 30 for counties and 23 for boroughs (2 & 3 Will. IV. c. 65). The number of Irish representatives is 105, *viz.* 64 for counties and 41 for boroughs (3 & 4 Will. IV. c. 88.)'

[g] 4 Inst. 14.

[h] 4 Jan. 1648.

III. Of the laws and customs of the Parliament collectively.

III. We are next to examine the laws and customs relating to parliament, thus united together and considered as one aggregate body.

The power and jurisdiction of parliament, says Sir Edward Coke,[i] is so transcendent and absolute, that it cannot be confined either for causes or persons within any bounds. And of this high court, he adds, it may be truly said, "*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*" It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs
[161] and grievances, operations, and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the Crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land, as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves, as was done by the act of union, the several statutes for triennial and septennial elections, 'and the Reform Act, 1832.' It can, in short, do everything that is not naturally impossible; and, therefore, some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.[j] True it is, that what the parliament does no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of the great Lord Treasurer Burleigh, "That England could never be ruined but by a parliament;"

[i] 4 Inst. 36.

[j] The omnipotence of Parliament signifies nothing more than the supreme sovereign power of the state, or a power of action uncontrolled by any superior. In this sense the sovereign, in the exercise of the prerogative, and the House of Lords, in the interpretation of laws, 'in its judicial capacity,' are also omnipotent; that is, free from the control of any superior provided by the constitution.—[CHRISTIAN.]

and, as Sir Matthew Hale observes,[k] this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy. To the same purpose the President Montesquieu, though I trust too hastily, presages, that as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose its liberty, will perish: it will perish whenever the legislative power shall become more corrupt than the executive.

It must be owned that Locke,[l] and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is thereby forfeited, and devolves to those who gave it." But however just this conclu- [162]
sion may be in theory, we cannot practically adopt it, nor take any *legal* steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event as must render all legal provisions ineffectual. So long, therefore, as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

Qualification of members of both houses.

In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper to manage it, it is provided by the custom and law of parliament,[m] that no one shall sit or vote in either house, unless he be *twenty-one years of age*. This is also expressly declared by statute 7 & 8 Will. III. c. 25, with regard to the House of Commons; doubts having arisen, from some contradictory adjudications, whether or no a minor was inca-

[k] Of Parliaments, 49.
[l] On Gov. p. 2, § 149, 227.
[m] Whitelocke, c. 50; 4 Inst. 47.

pacitated from sitting in that house.[n] It is also enacted by statute 7 Jac. I. c. 6, 'and 1 & 2 Will. IV. c. 9,' that no member be permitted to 'sit or vote in' the House of Commons ('except for the choosing of a speaker'), till he has taken the *oath* of allegiance, 'at the table of the house;' and by 30 Car. II. st. 2, 1 Geo. I. c. 13, 'and 6 Geo. III. c. 58,' that no member shall vote or sit in either house, till he has in the presence of the house taken the oaths of allegiance, supremacy, and abjuration. 'But as these oaths involve a declaration against transubstantiation and other doctrines of the Church of Rome, so that members of that persuasion could not conscientiously subscribe them, Roman Catholic members of parliament are permitted (10 Geo. IV. c. 7, s. 2) to take the oath prescribed by the Roman Catholic Relief Act.' *Aliens*, unless naturalized, were likewise by the law of parliament incapable to serve therein;[o] and now it is enacted by statutes 12 & 13 Will. III. c. 2, 'and 7 & 8 Vict. c. 66, s. 6,' that no alien, even though he be naturalized, shall be
[163] capable of being a member of either house of parliament. And there are not only these standing incapacities; but if any person is made a peer by the king, or elected to serve in the House of Commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member;[p] and this by the law and custom of parliament.

The law of Parliament.

For, as every court of justice has laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament has also its own peculiar law, called the *lex et consuetudo parliamenti*; a law which Sir Edward Coke[q] observes, is, "*ab omnibus quærenda, a multis ignorata, a paucis cognita.*" It will not therefore be expected that we should enter into the examination of this law, with any degree of minuteness: since, as the same learned author assures us,[r] it is much better to be learned out of the rolls of parliament,

[n] Com. Jour. 10 Mar. 1623; 18 Feb. 1625.

[o] Com. Jour. 16 Dec. 1690.

[p] Whitelocke, of Parl. c. 102. See Lords' Jour. 3 May, 1620; 13 May, 1624; 26 May, 1725. Com. Jour. 14 Feb. 1580; 21 Jun. 1628; 9 Nov., 21 Jan. 1640; 6 Mar. 1676; 6 Mar. 1711; 7 Feb. 1769; 17 Feb. 1769; Hatsell's Precedents, vol. i. p. 53.

[q] 1 Inst. 11.

[r] 4 Inst. 50.

and other records, and by precedents, and continual experience, than can be expressed by any one man. It will be sufficient to observe, that the whole of the law and custom of parliament has its origin from this one maxim, "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere."[s] Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case.[t] But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws.

The *privileges* of parliament are likewise very large and indefinite. And therefore when in 31 Hen. VI. the House of Lords propounded a question to the judges concerning them, the chief justice, Sir John Fortescue, in the name of his brethren, declared, "that they ought not to make answer to that question: for it hath not been used aforetime that the *The privileges of Parliament.* [164]

[s] 4 Inst. 15.

[t] 'In the case of *Stockdale* v. *Hansard* (7 Car. & Payne, 737; 9 A. & E. 1, and 11 A. & E. 253), the extent to which the courts of justice can take cognizance of the privileges of the House of Commons was much discussed. The House of Commons had ordered a certain Report to be printed, containing matter reflecting upon Stockdale, which, if printed by any private person, would have been a libel. For the publication of this Report, pursuant to the order of the House, Stockdale brought an action against Messrs. Hansard, the printers to the House of Commons. They pleaded that the documents in question had been published under the direction of the House, and that the House had resolved that the power of publishing such of their reports, votes, and proceedings as they thought conducive to the public interest, was an essential incident to the constitutional functions of Parliament, more especially to the Commons' House as the representative portion of it. Upon demurrer to this plea, the Court of Queen's Bench had to decide whether a court of law is or is not excluded by the "*law of Parliament*" from the consideration of a privilege claimed by a formal resolution of the House of Commons, and set up by their printer as a justification of an act otherwise unlawful. After a careful examination of all the authorities, and the most anxious consideration of the arguments, the four judges, Denman, C. J., Littledale, Patteson, and Coleridge, were unanimous in holding the plea bad, thus overruling the defence set up by Messrs. Hansard. The Reports of the case are alike interesting and amusing to the general reader as they are instructive to the lawyer. In consequence of the decision, a statute was passed for the protection of persons publishing parliamentary reports, votes, or other proceedings by order of either House.' (3 & 4 Vict. c. 9.)

justices should in any way determine the privileges of the high court of parliament. For it is so high and mighty in its nature, that it may make law: and that which is law, it may make no law: and the determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices." [u] Privilege of parliament was principally established in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the Crown. If, therefore, all the privileges of parliament were set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite.[v] Some, however, of the more notorious privileges of the members of either house are, privilege of speech, and of person.[w] As to the first, privilege of speech, it is declared by the statute 1 W. & M. st. 2, c. 2, as one of the liberties of the people, "that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the sovereign in person, by the speaker of the House of Commons, at the opening of every new parliament. So likewise is the other personal privilege, which immunity is as ancient as Edward the Confessor, in whose laws [x] we find this
[165] precept, "*ad synodos venientibus, sive summoniti sint, sive per se quid agendum habuerint, sit summa pax:*" and so too, in the old Gothic institutions, "*extenditur hæc pax et securitas ad quatuordecim dies, convocato regni senatu.*" [y] This included formerly not only privilege from illegal violence, but also from legal

[u] Seld. Baronage, part 1, c. 4.

[v] 'Lord Holt has laid down the law very differently from Sir Edw. Coke and Sir Wm. Blackstone.' "The authority of Parliament is from the law; and, as it is circumscribed by the law, so it may be exceeded; and, if they do exceed those legal bounds and authority, their acts are wrongful, and cannot be justified any more than the acts of private men." (1 Salk. 505; 2 Ld. Raym. 1114.)

[w] 'The privileges "of their domestics and of their lands and goods," mentioned in this place by Sir Wm. Blackstone, were abolished by the statute 10 Geo. III. c. 50.'

[x] Cap. 3.

[y] Steirnh. de Jure Goth. l. 3, c. 3.

arrests, and seizures by process from the courts of law. And still to assault by violence a member of either house is a high contempt of parliament, and is there punishable with the utmost severity. It has likewise peculiar penalties annexed to it in the courts of law, by the statutes 5 Hen. IV. c. 6, and 11 Hen. VI. c. 11. Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law in matters of civil right are now at an end, save only as to the freedom of the member's person; which in a peer (by the privilege of peerage) is for ever sacred and inviolable; and in a commoner (by privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting:[z] which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. As to all other privileges, which obstruct the ordinary course of justice, they were restrained by the statutes 12 Will. III. c. 3, 2 & 3 Ann. c. 18, and 11 Geo. II. c. 24, and are now totally abolished by statute 10 Geo. III. c. 50, which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretence of any such privilege; except that the person of a member of the House of Commons shall not thereby be subjected to any arrest of imprisonment. Likewise, for the benefit of commerce, it is provided by 'the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), that if any trader, having privilege of parliament, commits any act of bankruptcy, he may be dealt with in like manner as any other trader; but shall not be subject [166]
to be arrested or imprisoned during the time of such privilege, except in cases made felonies or misdemeanors under the bankrupt laws.'[a]

The only way by which courts of justice could anciently take cognizance of privilege of parliament was by writ of pri-

[z] 2 Lev. 72; *Goudy* v. *Duncombe*, 1 Ex. 430.

[a] 'A member of the House of Commons, adjudicated a bankrupt, is incapable of sitting in the House till his bankruptcy is superseded or his debts paid in full; and if either one or other event does not take place within twelve months, his seat becomes vacant.' (52 Geo. III. c. 144.)

vilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit.[b] For when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office.[c] But since the statute 12 Will. III. c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it has been held that such arrest is irregular *ab initio*, and that the party may be discharged upon motion.[d] It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute 1 Jac. I. c. 13, and that of King William (which remedy some inconveniences arising from privilege of parliament) speak only of civil actions. And therefore the claim of privilege has been usually guarded with an exception as to the case of indictable crimes;[e] or as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace.[f] Whereby it seems to have been understood that no privilege was allowable in any *crime* whatsoever; for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting wherein privileged persons have been convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session;[g] which proceeding has afterwards received the sanction and approbation of parliament.[h] To which may be added, that the case of writing and publishing seditious libels, has been resolved by both houses,[i] not to be entitled to privilege; and that the
[167] reasons upon which that case proceeded,[j] extended equally to every indictable offence. So that the chief, if not the only, privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained: a practice that is daily used upon the slightest military accusations, preparatory to a trial by a court-martial;[k] and which is recognized by the several temporary statutes for suspending the *Habeas Corpus* Act; whereby it

[b] Dyer, 59; 4 Pryn. Brev. Parl. 757.
[c] Latch. 48; Noy 83.
[d] Stra. 989.
[e] Com. Jour. 17 Aug. 1641. 4 Inst. 25; Com. Journ. 20 May, 1675; *Wilkes's case*, 2 Wils. 151.
[f] Mich. 16 Edw. IV. in Scacch.; Lord Raym. 1461.
[g] Com. Jour. 16 May, 1726.
[h] Jour. 24 Nov., and 29 Nov. 1763.
[i] Lords' Protest, 29 Nov. 1763.
[k] Com. Jour. 20 Apr. 1762.

is provided, that no member of either house shall be detained till the matter of which he stands suspected be first communicated to the house of which he is a member, and the consent of the said house obtained for his commitment or detaining.[l] But yet the usage has uniformly been, ever since the revolution, that the communication has been subsequent to the arrest.

These are the general heads of the laws and customs relating to parliament, considered as one aggregate body. We will next proceed to

IV. The laws and customs relating to the *House of Lords in particular*. These, if we exclude their judicial capacity, which will be more properly treated of in the third and fourth books of these Commentaries, will take up but little of our time. IV. The laws and customs of the House of Lords.

One very ancient privilege 'now obsolete,' is that declared by the charter of the forest,[m] confirmed in parliament 9 Hen. III.; viz., that every lord spiritual or temporal summoned to parliament, and passing through the royal forests, may, both in going and returning, kill one or two of the deer without warrant; in view of the forester if he be present, or on blowing a horn if he be absent; that he may not seem to take the royal venison by stealth.

In the next place they have a right to be attended, and constantly are, by the judges of the Courts of Queen's Bench and Common Pleas, and the barons of the Exchequer; as likewise by the Queen's learned counsel, being serjeants;[n] for their advice in points of law, and for the greater dignity of their proceedings. The secretaries of state, with the attorney and solicitor general, were also used to attend the House of Peers, and have to this day (together with the judges, &c.), their regular writs of summons issued out at the beginning of every parliament,[o] *ad tractandum et consilium impendendum*, though not *ad consentiendum;* but whenever of late years they have been members of the House of Commons,[p] their attendance here has fallen into disuse. [168]

[l] See particularly the statute 17 Geo. II. c. 6.

[m] C. 11.

[n] 'Formerly also by the masters in Chancery.'

[o] Stat. 31 Hen. VIII. c. 10; Smith's Commonw. b. 2, c. 3; Moor. 551; 4 Inst. 4; Hale, of Parl. 140.

[p] See Com. Jour. 11 Apr. 1614; 8 Feb. 1620; 10 Feb. 1625; 4 Inst. 48.

Another privilege is, that every peer, by licence from the sovereign, may make any other lord of parliament his proxy, to vote for him in his absence.[q] A privilege which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people.[r]

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest.

All bills likewise, that may in their consequences any way affect the right of the peerage, are by the custom of parliament to have their first rise and beginning in the House of Peers, and to suffer no changes or amendments in the House of Commons.

There are also some statutes which relate peculiarly to the House of Lords. Thus the statutes 6 Ann. c. 23, '2 & 3 Will. IV. c. 63, 10 & 11 Vict. c. 52, and 14 & 15 Vict. c. 87,' regu-
[169] late the election of the sixteen representative peers of North Britain, in consequence of the twenty-second and twenty-third articles of the union; and for that purpose prescribe the oaths,[s] &c. to be taken by the electors; direct the mode of ballotting; prohibit the peers electing from being attended in an unusual manner; and expressly provide, that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *præmunire*. 'The election of the representative peers for Ireland is regulated, as we have already seen, by the fourth article of the Union.'

V. Laws and Customs of the House of Commons.

V. The peculiar laws and customs of the House of Commons relate principally to the raising of taxes, and the elections of members to serve in parliament.

First, with regard to taxes: it is the ancient indisputable privilege and right of the House of Commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them;[t] although their grants are not

[q] Seld. Baronage, p. 1, c. 1.

[r] 4 Inst. 12. No peer can hold more than two proxies; and if a peer, after appointing a proxy, appear personally in Parliament, his proxy is revoked and annulled. No proxy can vote upon a question of guilty or not guilty; and a spiritual lord can only be a proxy for spiritual lords, and a temporal lord for temporal lords. Proxies cannot be used in a committee.—[CHRISTIAN.]

[s] 14 & 15 Vict. c. 87; 15 & 16 Vict. c. 35.

[t] 4 Inst. 29.

effectual to all intents and purposes, until they have the assent of the other two branches of the legislature. The general reason given for this exclusive privilege of the House of Commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable, if the Commons taxed none but themselves: but it is notorious that a very large share of property is in the possession of the House of Lords: that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this. The lords being a permanent hereditary body, created at pleasure by the sovereign, are supposed more liable to be influenced by the Crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject: it is sufficient that they have a power of rejecting, if they think the commons too lavish or improvident in their grants. But so [170] reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill;[u] under which appellation are included all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the 'property-tax;' or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like. Yet Sir Matthew Hale[v] mentions one case, founded on the practice of parliament in the reign of Henry VI.,[w] wherein he thinks the lords may alter a money bill: and that is, if the commons grant a tax for *four years;* and the lords alter it to a less time, as for *two* years; here, he says, the bill need not be sent back to the

[u] Hallam's Const. Hist. vol.iii.ch.13;

[v] On Parliaments, 65, 66.

[w] Year-book, 33 Hen. VI. 17. But see the answer to this case by Sir Heneage Finch, Com. Jour. 22 Apr. 1671.

commons for their concurrence, but may receive the royal assent without further ceremony; for the alteration of the lords is consistent with the grant of the commons. But such an experiment will hardly be repeated by the lords, under the present improved idea of the privilege of the House of Commons, and, in any case where a money bill is remanded to the commons, all amendments in the mode of taxation are sure to be rejected.

Next with regard to the elections of knights, citizens, and burgesses; we may observe that herein consists the exercise of the democratic part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies therefore it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: because such a man was
[171] esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had no title. In England, where the people do not debate in a collective body, but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions, which may be reduced to these three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

Qualifications of electors.

1. As to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his

liberty, and his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

And this constitution of suffrages is framed upon a wiser principle, with us, than either of the methods of voting, by centuries or by tribes, among the Romans. In the method by centuries, instituted by Servius Tullius, it was principally property, and not numbers, that turned the scale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws passed by the former method had usually too great a tendency to aggrandize the patricians [172]
or rich nobles; and those by the latter had too much of a levelling principle. Our constitution steers between the two extremes. Only such are entirely excluded, as can have no will of their own: there is hardly a free agent to be found, who is not entitled to a vote in some place or other in the kingdom. Nor is comparative wealth, or property, entirely disregarded in elections; for though the richest man has only one vote at one place, yet if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives.[x]

Electors for knights of the shire.

But to return to our qualifications; and first those of electors for knights of the shire. 1. By statute 8 Hen. VI. c. 7, and 10 Hen. VI. c. 2, (amended by 14 Geo. III. c. 58,) the knights of the shire are to be chosen of people whereof

[x] "This" (says Sir William Blackstone) "is the spirit of our constitution; not that I assert it is in fact quite so perfect as I have here endeavoured to describe it, for, if any alteration might be wished or suggested in the present frame of Parliaments, it should be in favour of a more complete representation of the people." And in a note the learned commentator adds, "The candid and intelligent reader will apply this observation to many other parts of the work before him, wherein the constitution of our laws and government are represented as nearly approaching to perfection; without descending to the invidious task of pointing out such deviations and corruptions, as length of time and a loose state of national morals have too great a tendency to produce. The incurvations of practice are then the most notorious when compared with the rectitude of the rule; and to elucidate the clearness of the spring, conveys the strongest satire on those who have polluted or disturbed it."

every man shall have freehold to the value of forty shillings by the year within the county; which (by subsequent statutes) is to be clear of all charges and deductions except parliamentary and parochial taxes. The knights of shires are the representatives of the landholders, or landed interest of the kingdom: their electors must therefore have estates in lands or tenements within the county represented: these estates must 'formerly have been' freehold, that is, for term of life at least: because beneficial leases for long terms of years were not in use at the making of these statutes, and copyholders were then little better than villeins, absolutely dependent upon their lords: and this freehold must have been of forty shillings
[173] annual value: because that sum would then, with proper industry, have furnished all the necessaries of life, and rendered the freeholder, if he pleased, an independent man. For Bishop Fleetwood, in his *chronicum preciosum*, written at the beginning of the present century, has fully proved forty shillings in the reign of Henry VI. to have been equal to twelve pounds *per annum* in the reign of Queen Anne; and, as the value of money is very considerably lowered since the bishop wrote, I think we may fairly conclude, from this and other circumstances, that what was equivalent to twelve pounds in his days is equivalent to twenty at present. 'The Reform Act (2 Will. IV. c. 45) on the one hand considerably extended, and on the other hand restricted the right of voting in counties. The electors of knights of the shire consist now of

1. 'Forty-shilling freeholders of inheritance.'

2. 'Forty-shilling freeholders for life or lives, seised on the 7th of June, 1832 (the date of the Reform Act), and continuing so seised.'

3. 'Forty-shilling freeholders in the actual and bona fide occupation of their freeholds, or who acquired them by marriage, marriage settlement, devise or promotion to any benefice or office.'

4. 'Freeholders for life, or lives of the clear yearly value of ten pounds above all rents and charges, and persons legally or equitably seised of any lands or tenements of copyhold, or any other tenure whatever (except freehold) for life or lives, or any larger estate of the clear yearly value of ten pounds.'

5. 'Leaseholders of freehold or other lands for the residue, whatever it may be, of any term originally created for a period

of not less than sixty years (whether determinable on a life or lives, or not) of the clear yearly value of not less than ten pounds, or for the residue, whatever it may be, of any term originally created for a period of not less than twenty years (whether determinable on a life or lives or not) of the clear yearly value of not less than fifty pounds. Sub-lessees of either of such terms must be in the actual possession of the premises to entitle them to vote.'

6. 'Occupiers as tenants under one landlord, of lands or tenements at a yearly rent of not less than fifty pounds.'

Thus much for the electors in counties.

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Electors of citizens and burgesses.

As for the electors of citizens and burgesses, these are supposed to be the mercantile part or trading interest of this kingdom. But as trade is of a fluctuating nature, and seldom long fixed in a place, it was formerly left to the Crown to summon, *pro re natâ*, the most flourishing towns to send representatives to parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the legislature. But the misfortune was, that the deserted boroughs continued to be summoned, as well as those to whom their trade and inhabitants were transferred; except a few which petitioned to be eased of the expense, then usual, of maintaining their members: four shillings a-day being allowed for a knight of the shire, and two shillings for a citizen or burgess; which was the rate of wages established in the reign of Edward III.[y] The universities were in general, not empowered to send burgesses to parliament; though once, in 28 Edw. I., when a parliament was summoned, to consider of the king's right to Scotland, there were issued writs which required the University of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose.[z] But it was King James the First who indulged them with the permanent privilege to send constantly two of their own body; to serve for those students, who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect in the legis-

[y] 4 Inst. 46. "Hence," says Blackstone, "the members for boroughs now [1758] bear above a quadruple proportion to those for counties, and the number of Parliament men is increased since Fortescue's time, in the reign of Henry the Sixth, from 300 to upwards of 500, exclusive of those for Scotland." Bl. Com. vol. i. p. 174.

[z] Prynne, Parl. Writs, 1, 345.

lature the rights of the republic of letters.[a] The right of election in boroughs 'was formerly and in some respects still' is various, depending entirely on the several charters, customs, and constitutions of the respective places, which 'formerly'
[175] occasioned infinite disputes. 'The Reform Act, while it preserved many then existing rights, at the same time considerably narrowed the old rights of voting in boroughs, and introduced a new class of electors, whose qualification depends on the occupation of property.

1. 'Subject to certain restrictions as to residence, the right of voting was reserved to all persons enjoying the franchise on the 7th of June, 1832.'

2. 'Resident burgesses and freemen (and freemen and liverymen in the city of London), and resident freeholders or burgage tenants in cities or towns, being counties of themselves, are entitled to the franchise as before the Act.'

3. 'The franchise was newly conferred on occupiers (as owners or tenants) of houses or buildings, being, either separately or together with land, of the clear yearly value of not less than 10*l.*, and paying rates for the relief of the poor. This right of voting was the principal feature of the Reform Act, so far as regards the qualification of electors, and in the new parliamentary boroughs created by that Act, such as Birmingham and Manchester, the electors consist entirely of this class of persons.'

'Formerly, the right of each person to vote was ascertained at the time of the election, and as he tendered his vote; but now a register of voters is yearly made in counties and boroughs; and the appearance of a person's name on the register, is decisive of his right, and so, on the other hand, the absence of his name is conclusive of his want of qualification. This system of registration was first introduced by the Reform Act, but the method then adopted proving defective in many respects, the statute 6 Vict. c. 18 was subsequently passed, regulating the formation of this register.'

'In counties, the overseers of every parish and township publish before the 20th of June, a notice (with the forms of which they are supplied by the clerk of the peace) requiring persons entitled to vote, who are not already on the register,

[a] The Universities, it may be added here, are not affected by the Reform Act.

or who have changed their qualification or place of abode, and who are desirous to have their names inserted in the new register, to send in a written notice of their claims before the 20th of July, according to a certain form which is provided. Lists of such claims and also copies of the existing register are then published, and any person may object to any of such names, a list of which objections, if any, is also to be published, and all these lists are to be delivered to the clerk of the peace before the 29th of August.'

'In the case of cities and boroughs, the overseers of each parish in it are to publish a notice that no person will be entitled to vote in respect of the occupation of premises, unless his rates and taxes are paid by the 20th of July, and such overseers are also to publish before the 1st of August, a list of 10*l.* occupiers, and town-clerks are to prepare and publish the list of freemen. Persons entitled to the franchise, who are omitted from the borough lists, are to give notice of their claims. Objections may be made, as in the case of counties, and lists of claims and objections are to be published, and copies of all these lists are to be delivered to the town-clerk.'

'Abstracts of these lists of county and borough voters, claims, and objections, are transmitted to the revising barristers, who are barristers of not less than three years' standing, annually appointed by the senior judge of assize in each summer circuit (and for Middlesex, London, and Westminster, by the Lord Chief Justice of the Court of Queen's Bench), and who hold district courts in counties and in boroughs between the 15th of September and the last day of October for revising the lists. At these courts the overseers, claimants, and other persons interested attend, and the barrister revises or corrects the lists by adding or expunging names, correcting mistakes, and making alterations therein, according to his decision on the validity of the claims and objections brought before him for his adjudication.' Revising the lists of voters.

'The county lists are returned to the clerk of the peace, who signs and delivers a copy printed in a book to the sheriff, and the borough lists are in like manner returned to the town-clerk, who signs a printed copy, and delivers it to the returning officer. The printed signed books so formed become the register of voters for one year, from the last day of November in the year it is made, to the first of December in the ensuing year.'

'Appeals may be allowed on points of law from the decision of the revising barrister, if he thinks such appeals reasonable. These appeals are determined by the Court of Common Pleas, on a statement of facts or case, as it is generally termed, prepared by the revising barrister, and the decision of the court is notified to the sheriff or returning officer, as the case may be, and the register altered conformably to such decision.'

'Although the general nature of the qualification for electors in counties and boroughs has been stated, it is in many cases necessary, in order to entitle the possessors of such qualification to have their names placed on the register, that they should have enjoyed it for a certain period. Thus, all persons who claim to vote in counties in respect of freehold, copyhold, customary or ancient demesne qualifications, must have been in the actual possession thereof, or in the receipt of the rents and profits for six calendar months at least, next previous to the last day of July in the year in which they are registered. Occupiers of land at a rent of 50*l.* must have been in the occupation of such lands at that rent for twelve months before that day. So in boroughs, the 10*l.* occupiers must have occupied for twelve months before that day, and been liable to be rated to the relief of the poor in respect of the same premises for that period.'

'It must be observed also, that the receipt of parochial relief within twelve months of the same period, the being employed in managing or collecting the revenue, whether in the excise, customs, post office, or other department, or the being a police magistrate, or otherwise employed under the Police Acts, disqualify a person, otherwise entitled, from being an elector.

Qualifications of the elected.

Next, as to the qualifications of persons to be *elected* members of the House of Commons. Some of these depend upon the law and custom of parliaments, declared by the House of Commons;[b] others upon certain statutes. And from these it appears, 1. That they must not be aliens born, or minors, 'idiots, lunatics, or outlaws in criminal prosecutions.'[c] 2. That they must not be any of the judges 'of the Superior Courts of Common Law,'[d] because they sit in the lords' house; 'nor of

[b] 4 Inst 47, 48.

[c] Com. Jour. 1623, 1625.

[d] Com. Jour. 9 Nov. 1605.

the representative peers of Ireland,[e] nor of the judges of the Court of Session in Scotland,[f] nor of the judges of the courts of Ireland,[g] nor of the judges of the Admiralty,[h] nor of the Commissioners in Bankruptcy,[i] nor of the Commissioners of the Court for the Relief of Insolvent Debtors,[j] nor of the judges of the county courts,[k] nor of the assistant barristers in Ireland,[l] nor of the police magistrates,[m] nor of the revising barristers,[n] nor of the clergy, for they sit in the convocation;[o] nor persons attainted of treason or felony,[p] for they are unfit to sit anywhere. 3. That sheriffs of counties, and mayors and bailiffs of boroughs are not eligible in their respective jurisdictions, as being returning officers;[q] but that the sheriffs of one county are eligible to be knights of another.[r] 4. That in strictness, all members ought to have been inhabitants of the place for which they are chosen:[s] but this, having been long disregarded, was at length entirely repealed by statute 14 Geo. III. c. 58. 5. That no persons concerned in the management of any duties or taxes created since 1692, except the Commissioners of the Treasury,[t] nor any of the officers following,[u] viz., commissioners of prizes, transports, sick and wounded, wine licences, navy, and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; commissioners for auditing public accounts; commissioners of woods and forests, &c.;

[e] 39 & 40 Geo. III. c. 67.

[f] 7 Geo. II. c. 16, s. 4.

[g] 1 & 2 Geo. IV. c. 44.

[h] 3 & 4 Vict. c. 66.

[i] 1 & 2 Will. IV. c. 56, s. 60.

[j] 7 Geo. IV. c. 57.

[k] 10 & 11 Vic. c. 102, s. 18.

[l] 36 Geo. III. c. 25, s. 3.

[m] 10 Geo. IV. c. 44, s. 18.

[n] 16 Vic. c. 18, s. 29.

[o] Com. Jour. 13 Oct. 1553; 8 Feb. 1620; 17 Jan. 1661. 'Whatever may have been the original reason for excluding the clergy, the statute 41 Geo. III. c. 63 (the result of Horne Tooke's election), expressly disables priests and deacons (and ministers of the Church of Scotland) from being elected members of Parliament; and this provision was extended to Roman Catholic priests by the statute 10 Geo. IV. c. 7, s. 9.'

[p] Com. Jour. 21 Jan. 1580; 4 Inst. 47.

[q] Bro. Abr. t. Parliament, 7; Com. Jour. 25 June, 1604; 14 Apr. 1614; 22 Mar. 1620, 2, 4; 15 Jun.; 17 Nov. 1685, Hal. of Parl. 114.

[r] 4 Inst. 48; Whitelocke, of Parl. ch. 99, 100, 101.

[s] Stat. 1 Hen. V. c. 1; 23 Hen. VI. c. 15.

[t] Stat. 5 & 6 W. & M. c. 7.

[u] Stat. 11 & 12 Wm. III. c. 2; 12 & 13 Wm. III. c. 10; 6 Anne, c. 7; 15 Geo. II. c. 22; 25 Geo. III. c. 52, s. 25; 54 Geo. III. c. 184, s. 14; 7 & 8 Geo. IV. c. 53: 10 Geo. IV. c. 62; 6 & 7 Will. IV. c. 71, s. 5; 14 & 15 Vict. c. 42, s. 10. See also the stat. 41 Geo. III. c. 52, extending the disabilities existing in Great Britain and Ireland to the Parliament of the United Kingdom.

M 2

tithe commissioners;' governors of plantations and their
[176] deputies; officers of Gibraltar; 'governors and deputy-governors of any of the settlements, presidencies, territories, or plantations of the East India Company;' officers of the Excise and Customs; clerks or deputies in the several offices of the Treasury, Exchequer, Navy, Victualling, Admiralty, pay of the army or navy, secretaries of state, stamps, appeals, wine licences, hackney coaches, hawkers and pedlars, nor any persons that hold any new office under the Crown, created since 1705,[v] are capable of being elected or sitting as members. 6. 'That no person holding a contract on account of the public service, is capable of being elected, or sitting as a member during the time he executes or holds such contract.'[w] 7. That no person having a pension under the Crown during pleasure, or for any term of years, is capable of being elected or sitting.[x] 8. That if any member accepts an office under the Crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected.[y] 9. 'If any candidate, at an election for a member of Parliament, is declared by an election committee guilty, by himself or his agents, of bribery, treating, or undue influence at such election, he is incapable of being elected, or sitting in Parliament for the particular place during the parliament then in existence.'[z] That all knights of the shire shall be actual knights, or such notable esquires and gentlemen as have sufficient to be knights, and by no means of the degree of yeomen.[a] This is reduced to a still greater certainty, by ordaining, 10. That every 'member for a county, riding, or division of a county in England, Wales, or Ireland,' shall have a clear estate 'legal or equitable in lands,' to the value of six hundred pounds *per annum*, and every citizen or burgess ('elected for a borough in England, Wales, or Ireland') to the value of three hundred pounds; except the eldest sons 'or heirs-apparent' of peers, and of persons qualified to be knights of shires, and except the members for the two universities: which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest

[v] Stat. 6 Anne, c. 7.
[w] 22 Geo. III. c. 45.
[x] 6 Anne, c. 7; 1 Geo. I. st. 2, c. 56.
[y] Stat. 6 Anne, c. 7.
[z] 17 & 18 Vict. c. 102, s. 36.
[a] Stat. 23 Hen. VI. c. 14.

to make choice of landed men: and of this qualification the member must make oath, and give in the particulars in writing, at the time of taking his seat, 'and also at the time of election, if so required.'[b] But subject to these standing [177] restrictions and disqualifications, every subject of the realm is eligible of common right:[c] though there are instances wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible, *for that parliament* by a vote of the House of Commons, or *for ever* by an act of the legislature.[d] But it was an unconstitutional prohibition which was grounded on an ordinance of the House of *Lords*,[e] and inserted in the *king's* writs for the Parliament holden at Coventry, 6 Henry IV., that no apprentice or other man of the law should be elected a knight of the shire therein;[f] in return for which, our law books and historians[g] have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and Sir Edward Coke observes with some spleen,[h] that there never was a good law made thereat.

3. The third point, regarding elections, *is the method of proceeding therein.* This is also regulated by the law of parliament, and the several statutes referred to in the note;[i] Proceedings at elections.

[b] 1 & 2 Vict. c. 48.

[c] 'Thus the Master of the Rolls is not among the number of judges excluded, either at common law or by statute; nor are recorders of boroughs among the inferior magistrates similarly disqualified. Peers of Ireland, not elected as representative peers, may sit for any county or borough in Great Britain.' (39 & 40 Geo. III. c. 67.)

[d] Stat. 7 Geo. I. c. 28.

[e] 4 Inst. 10, 48: Pryn. Plea for Lords, 379; 2 Whitelocke, 359, 368.

[f] Pryn. on 4 Inst. 13.

[g] Walsing. A.D. 1405. "All the lawyers being thus excluded from the Parliament, the king's demands were by that means obtained; and by that Parliament was granted an unusual tax (*tricabilis et valde gravis*), of which I would have set down the particulars, had not the authors thereof concealed it for ever from posterity by causing the papers to be burnt." 'An attempt was also made in 1649 to exclude lawyers from the Parliament; and the dislike of Archbishop Laud and Lord Strafford for the whole body of the common lawyers is well known.' (Hallam Const. Hist. vol. ii. ch. 8.)

[h] 4 Inst. 48.

[i] 7 Hen. IV. c. 15; 8 Hen. VI. c. 7; 23 Hen. VI. c. 14; 1 W. & M. st. 2, c. 2; 2 W. & M. st. 1, c. 7; 5 & 6 W. & M. c. 20; 7 Wm. III. c. 4; 7 & 8 Will. III. c. 7, and c. 25; 10 & 11 Will. III. c. 7; 12 & 13 Will. III. c. 10; 6 Anne, c. 23; 9 Anne, c. 5; 10 Anne, c. 19, and c. 23; 9 Geo. II. c. 38; 18 Geo. II. c. 18; 19 Geo. II. c. 28; 24 Geo. III. sess. 2, c. 26; 25 Geo. III. c. 84; 28 Geo. III. c. 52; 53 Geo. III. c. 89; 2 Will. IV. c. 45; 2 & 3 Will. IV. c. 69; 5 & 6 Will. IV. c. 36; 6 & 7 Will. IV. c. 102; 3 & 4 Vict. c. 81; 6 Vict. c. 18; 10 & 11 Vict. c. 21; 15 & 16 Vict. c. 57; 16 & 17 Vict. c. 15, and c. 68; 17 & 18 Vict. c. 102.

all which I shall blend together, and extract out of them a summary account of the method of proceeding to elections.

As soon as the parliament is summoned, the Lord Chancellor (or if a vacancy happens during the sitting of parliament, the speaker, by order of the house; and without such order, if a vacancy happens by death, or the member's becoming a peer, in the time of a recess, 'and the fact is certified to him by two members') sends his warrant to the clerk of the Crown in Chancery; who thereupon issues out writs to the sheriffs of every county, for the election of all the members to serve for
[178] that county, 'and also writs' to the proper returning officers of boroughs, 'and to the Vice-Chancellor of the Universities,' commanding them to elect their members.

Elections of knights of the shire must be proceeded to by the sheriffs in person, at 'a special' county court 'to be holden not later than the twelfth, nor sooner than the sixth day after proclamation for that purpose made within two days after the receipt of the writ.' The county court is a court 'which was formerly' held every month or oftener by the sheriff, to try little causes not exceeding the value of forty shillings, in what part of the county he pleased to appoint for that purpose: but for the election of knights of the shire, it must be held at the place 'assigned by statute. Elections in cities and boroughs must be within six days after the receipt of the writ, of which day the returning officer is required to give three days' clear notice.'

Undue influence.

And, as it is essential to the very being of parliament, that elections should be absolutely free, therefore all undue influences upon the electors are illegal, and strongly prohibited. For Locke[j] ranks it among those breaches of trust in the executive magistrate, which according to his notions amount to a dissolution of the government, "if he employs the force, treasure, and offices of the society to corrupt the representatives, or openly to pre-engage the electors and prescribe what manner of persons shall be chosen. For thus to regulate candidates and electors, and new-model the ways of election, what is it (says he) but to cut up the government by the roots, and
[179] poison the very fountain of public security?" As soon therefore as the time and place of election, either in counties or

[j] On Gov. p. 2, § 222.

boroughs, are fixed, 'notice is given to the secretary-at-war, and' all soldiers 'within two miles of the place of nomination or taking of the poll, are required to remain within their barracks.'[k] Riots likewise have been frequently determined to make an election void. By vote also of the House of Commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, has any right to interfere in the election of commoners; and, by statute, the lord warden of the cinque ports shall not recommend any members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter, or dissuading him, he forfeits 100*l.* and is disabled to hold any office.

Bribery and corruption.

Thus are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption;[l] to prevent which 'various statutes have been from time to time passed, and were recently consolidated and amended by the statute 17 & 18 Vict. c. 102. The offences of bribery and using undue influence are by that act made misdemeanours. Candidates offending are also disqualified from sitting in parliament, and other offenders from appearing on the register of voters. Officers termed "election auditors" are to be annually appointed to audit and publish the bills of expenses incurred by candidates at elections; and no payments can be made

[k] 10 & 11 Vict. c. 21.

[l] The first instance that occurs of election bribery was so early as 13 Eliz., when one Thomas Longe (being a simple man and of small capacity to serve in Parliament) acknowledged that he had given the returning officer and others of the borough for which he was chosen four pounds to be returned member, and was for that premium elected; but for this offence the borough was amerced, the member was removed, and the officer fined and imprisoned (4 Inst. 23; Hale, of Parl. 112; Com. Jour. 10 & 11 May, 1571). But, as this practice (says Sir William Blackstone) has since taken deeper and more universal root, it has occasioned the making of various wholesome statutes; to complete the efficacy of which, there is nothing wanting but resolution and integrity to put them in strict execution (Bl. Com. vol. i. p. 180). 'And the Legislature has recently shown its earnestness in the matter by disfranchising the boroughs of Sudbury and St. Albans, and the freemen of Great Yarmouth, in consequence of the corrupt practices which were found to prevail at all elections in those places (7 & 8 Vict. c. 53; 11 & 12 Vict. c. 24; and 15 & 16 Vict. c. 9.')

except through this officer. Moreover, upon the address of both Houses of Parliament, the Queen is empowered to appoint commissioners to inquire into corrupt practices at particular elections.'

[180] Undue influence being thus (I wish the depravity of mankind would permit me to say, effectually) guarded against, the election is to be proceeded to on the day appointed; the sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office. 'The election in the first instance is determined, after the nomination of the candidates, by a show of hands in open court. If a poll be demanded, the proceedings are for that purpose adjourned, in the case of county elections, until the next day but two after the day of nomination, and in the case of cities and boroughs until the following day. For the purpose of recording the votes of the electors, or in other words of taking the poll, counties are divided into polling districts, each district having a convenient place appointed where, in the case of a contested election, booths are erected by the sheriff at the expense of the candidates, where the votes are recorded, one booth being provided for every four hundred and fifty electors. In like manner booths are provided by the returning officer for recording votes in cities and boroughs in such manner that not more than three hundred electors shall be allotted to poll in each.'

The Polling.

'In all elections, except in the universities, whether for counties or boroughs, only one day is allowed for recording the votes, and then only between the hours of eight in the morning and five in the afternoon in counties, and between eight in the morning and four in the afternoon in boroughs, this limitation of time being found very conducive to the purity of elections. In the universities, on account of the distance many of the electors may have to travel, the polling may continue for five days. If, however, the proceedings at any election are interrupted or obstructed by riot or open violence, the sheriff or returning officer may adjourn the nomination or the taking of the poll at any particular place until the following day, and so on from time to time until the interruption has ceased.'

'Formerly the qualification of each voter was liable to be called in question by a scrutiny at the time of the election,

but now the register of voters, made in the manner already mentioned, is conclusive evidence at the election of the qualification; and the only questions that can now be put to the voter, are, whether he is the same person whose name appears on the register, and whether he has already voted at that election. The voter may be required to swear to the affirmative on these points, and may be also required to take an oath against bribery and corruption.[m] With these exceptions, the only duty of the returning officer or his deputy is to inquire for whom the elector votes, and such vote is then recorded by the poll-clerks in the poll-books; and in county elections, after the close of the poll, the books are sealed and delivered to the sheriff or his under-sheriff, who on the next day but one opens them, casts up the number of votes, and declaring the state of the poll, makes proclamation of the member or members chosen. In borough elections the returning officer may declare the final state of the poll, either on its close or on the following day.'

The election being closed, the 'sheriff in counties, and the' returning officer in boroughs, returns the writ, 'with the names of the knights and burgesses' elected thereupon, to the clerk of the Crown in chancery; before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy; and this under the penalty of 500*l.* If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Henry VI., 100*l.*; and the returning officer in boroughs for a like false return 40*l*; and they are besides liable to an action, in which double damages shall be recovered, by the later statutes of King William: and any person bribing the returning officer shall also forfeit 300*l.* But the members returned by him are the sitting members, until the House of Commons, upon peti- [181]
tion, shall adjudge the return to be false and illegal. The form and manner of proceeding upon such petition are now regulated by statute '11 & 12 Vict. c. 98, under the provisions of which the speaker, in the first session of every parliament, appoints a general Committee of Elections, to whom all election petitions are in the first instance referred; and the

[m] It might not be amiss if the members elected were bound to take the latter oath, which in all probability would be much more effectual than administering it only to the electors. (Bl. Com. vol. i. p. 180.)

general committee appoints, in the manner provided by the Act, a select committee of five members to inquire into the allegations of the petition, and report the decision to the House.' And this abstract of the proceedings at elections of knights, citizens, and burgesses, concludes our inquiries into the laws and customs more peculiarly relative to the House of Commons.

VI. The method of making laws.

VI. I proceed now, sixthly, to the method of making laws; which is much the same in both houses: and I shall touch it very briefly, beginning in the House of Commons.' But first I must premise, that for dispatch of business each house of parliament has its *speaker*. The speaker of the House of Lords, whose office is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the sovereign's great seal, or any other appointed by royal commission: and, if none be so appointed, the House of Lords (it is said) may elect. The speaker of the House of Commons is chosen by the house; but must be approved by the sovereign. And herein the usage of the two houses differs, that the speaker of the House of Commons cannot give his opinion or argue any question in the house; but the speaker of the House of Lords, if a lord of parliament, may.[n] In each house the act of the majority binds the whole; and this majority is declared by votes openly and publicly given: not privately or by ballot. The latter method may be serviceable, to prevent intrigues and unconstitutional combinations; but it is impossible to be practised with us; at least in the House of Commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection.

Mode of bringing in a bill.

To bring a bill into the house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition;

[n] 'The speaker of the House of Commons never votes, but when there is an equality without his casting vote; and in such a case he usually votes *negatively*. The speaker of the House of Lords has no casting vote, his vote being counted with the rest of the House: and in the case of an equality of votes, the non-contents or negative voices have the same effect and operation as if they were in fact a majority, upon the principle, *semper præsumitur pro neganti*.'

'When the House of Commons resolves itself into a committee, the chairman of committees, who is regularly appointed at the commencement of every Parliament, takes the speaker's chair; and the speaker may then speak and vote as any other member; but his doing so is very unusual.'

which must be presented by a member, and usually sets forth the grievance desired to be remedied.[o] This petition (when [182] founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then (or otherwise, upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the house, without any petition at all. Formerly all bills were drawn in the form of petitions to the Crown, which were entered upon the *parliament rolls* with the sovereign's answer thereunto subjoined, not in any settled form of words, but as the circumstances of the case required:[p] and at the end of each parliament the judges drew them into the form of a statute, which was entered on the *statute rolls.* In the reign of Henry V., to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and, in the reign of Henry VI., bills in the form of acts, according to the modern custom, were first introduced.

The first and second readings.

The persons directed to bring in the bill present it in a competent time to the house, drawn out and printed, with a multitude of 'italics,' where anything occurs that is dubious, or necessary to be settled by the parliament itself (such especially as the precise date of times, the nature and quantities of penalties, or of any sums of money to be raised), which italics are theoretically blanks, or void spaces, being indeed only the skeleton of the bill. In the House of Lords, if the bill begins there, it is (when of a private nature) referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a con-

[o] 'The different modes of introducing and of proceeding in all bills, as well public as private, form the subject of a series of rules and directions, issued under the authority of each House. These constitute what are called the "Standing Orders," and they must in general be complied with in all cases. A standing-order committee, as it is termed, is appointed at the commencement of every session, and this committee will, in particular cases, where there has been no intentional disregard of the standing orders of the House, and no evil consequences are likely to arise therefrom, recommend the House to dispense with the standing orders, so as to allow a bill to be proceeded with, for which the proper notices have not been given, or the proceedings in which have not been in strict compliance with the standing orders. (May's Law and Practice of Parliament.)'

[p] See among numberless instances the *articuli cleri*, 9 Edw. II.

venient distance a second time; and after each reading the speaker opens to the house the substance of the bill, and puts the question whether it shall proceed any farther? The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be dropped for that session; as it must also, if opposed with success in any of the subsequent stages.

[183] After the second reading it is committed, that is, referred to a committee, which is either selected by the house in matters of small importance, or else, upon a bill of consequence, the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair (another member being appointed chairman), and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new-modelled. After it has gone through the committee, the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house has agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be 'printed,[q] and it is then in due course' read a third time, and amendments are sometimes then made to it, and new clauses added. The speaker then again opens the contents, and holding it up in his hands, puts the question, whether the bill shall pass? If this is agreed to, the title to it is then settled; which used to be a general one for all the acts passed in the session, till in the first year of Henry VIII. distinct titles were used for each chapter. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the bar of the House of Peers, and there delivers it to their speaker, who comes down from his woolsack to receive it.

The committee.

Proceedings in the other house.

It there passes through the same forms, and, if rejected, no

[q] 'Bills were formerly engrossed, after the report, on rolls of parchment; and in the same shape sent to the other House, and, after the royal assent, enrolled as statutes. This system was discontinued in 1849, and printing substituted. (May's Law and Practice of Parliament.')

more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message (upon matters of high dignity and importance, by two of the judges), that they have agreed to the same: and the bill remains with the lords if they have made no amendment [184] to it. But if any amendments are made, such amendments are sent down with the bill, to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; who, for the most part, settle and adjust the difference: but, if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the House of Lords. And when both houses have done with any bill, it always is deposited in the House of Peers, to wait the royal assent; except in the case of a bill of supply, which after receiving the concurrence of the lords is sent back to the House of Commons.[r] When an act of grace or pardon is passed, it is first signed by the sovereign, and then read once only in each of the houses, without any amendment.[s]

The royal assent may be given in two ways: 1. In person; when the sovereign comes to the House of Peers, in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the sovereign's answer is declared by the clerk of the parliament in Norman-French: a badge, it must be owned (now the only one remaining), of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the sovereign consents to a public bill, the clerk usually declares, "*le roy* (or *la reine*) *le veut*, the king (or the queen) wills it so to be;" if to a private bill, "*soit fait comme il est desiré*, be it as it is desired." If the sovereign refuses his assent, it is in the gentle language of "*le roy s'avisera*, the king will advise upon it." When a bill of supply is passed, it is carried up and The royal assent.

[r] Com. Jour. 24 July, 1662.
[s] D'Ewes' Jour. 20, 73; Com. Jour. 17 June, 1747.

presented to the king by the speaker of the House of Com-
[185] mons;[t] and the royal assent is thus expressed, "*le roy remercie ses loyal subjects, accepte leur benevolence, et aussi le veut,* the king thanks his loyal subjects, accepts their benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the Crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject: "*les prelats, seigneurs, et commons, en ce present parliament assemblés au nom de touts vous autres subjects, remercient tres humblement votre majesté, et prient à Dieu vous donner en santé bone vie et longue;* the prelates, lords, and commons, in this present parliament assembled, in the name of all your other subjects, most humbly thank your majesty, and pray to God to grant you in health and wealth long to live."[u] 2. By the statute 33 Hen. VIII. c. 21, the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high house. And, when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or Act of Parliament.

This statute or act is placed among the records of the kingdom, there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the emperor's edicts, because every man in England is, in judgment of law, party to making an Act of Parliament, being present thereat by his representatives. Formerly, before the invention of printing, it was used to be published by the sheriff of every county, the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session, commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publicè proclamari, et firmiter teneri et observari faciat.*" And the usage was to proclaim them at his county court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry VII.[v] 'Now, however, all the statutes of the realm are regularly printed by the Queen's printer, for the information of the whole land; and copies so printed are admitted

[t] Rot. Parl. 9 Hen. IV. in Pryn. 4 Inst. 30, 31.

[u] D'Ewes' Jour. 35.

[v] 3 Inst. 41; 4 Inst. 26.

as evidence of the statutes themselves in all courts of justice.'[w]

An Act of Parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It has power to bind every subject in the land, and the dominions thereunto belonging; nay, even the sovereign himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament: for it is a maxim in law that it requires the same strength to dissolve as to create an obligation. It is true it was formerly held that the king might in many cases dispense with penal statutes;[x] but now, by statute 1 W. & M. st. 2, c. 2, it is declared that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal. [186]

VII. Modes of adjourning, proroguing, and dissolving parliament

VII. There remains only, in the seventh and last place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or dissolved.

An *adjournment* is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other.[y] It has also been usual when the sovereign has signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the royal pleasure so signified, and to adjourn accordingly.[z] Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow: which would often be very inconvenient to both public and private business: for prorogation puts an end to the session; and then such bills as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session; whereas, after an adjournment, all things continue in the same state as

[w] 41 Geo. III. c. 90, s. 9; 8 & 9 Vict. c. 113, ss. 3, 4.

[x] Finch, L. 81, 234; Bacon. Elem. c. 19.

[y] 4 Inst. 28.

[z] Com. Jour. *passim*, *e. g.* 11 Jun. 1572; 5 Apr. 1604; 4 Jun., 14 Nov. 18 Dec. 1621; 11 Jul. 1625; 13 Sept. 1660; 25 Jul. 1667; 4 Aug. 1685; 24 Feb. 1691; 21 Jun. 1712; 16 Apr. 1717; 3 Feb. 1741; 10 Dec. 1745; 21 May, 1768.

at the time of the adjournment made, and may be proceeded on without any fresh commencement.

[187] A *prorogation* is the continuance of the parliament from one session to another, as an adjournment is the continuation of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in the presence of the sovereign, or by commission from the Crown, or frequently by proclamation.[a] Both houses are necessarily prorogued at the same time, it being a prorogation not of the House of Lords, or Commons, but of the parliament. The session is never understood to be at an end until a prorogation; though, unless some act be passed or some judgment given in parliament, it is in truth no session at all.[b] And formerly the usage was, for the sovereign to give the royal assent to all such bills as he approved, at the end of every session, and then to prorogue the parliament; though sometimes only for a day or two;[c] after which all business then depending in the houses was to be begun again. Which custom obtained so strongly, that it once became a question,[d] whether giving the royal assent to a single bill did not of course put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. I. c. 7, was passed to declare that the king's assent to that and some other acts should not put an end to the session; and, even so late as the reign of Charles II., we find a proviso frequently tacked to a bill,[e] that his majesty's assent thereto should not determine the session of parliament. But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session. 'The prorogation is usually for forty days, but the sovereign can always summon an adjourned or prorogued parliament to meet for the dispatch

[a] 'When it is intended that Parliament shall meet for the *dispatch of business* on the day to which it is prorogued, notice to this effect is given in the proclamation: otherwise it is prorogued to another day by a writ of prorogation. It is usual upon the day on which the writs of summons are returnable, for some of the officers of the House of Commons to assemble (without entering the house, or waiting for a message) in the House of Lords, when the lord chancellor reads the writ of prorogation, and declares Parliament to be prorogued accordingly.' (Com. Dig. Parl. p. 2; Com. Jour. 26 Nov. 1790; 3 Nov. 1761.)

[b] 4 Inst. 28; Hale, of Parl. 38; Hut. 61.

[c] Com. Jour. 21 Oct. 1553.

[d] Com. Jour. 21 Nov. 1554.

[e] Stat. 12 Car. II. c. 1; 22 & 23 Car. II. c. 1.

of business on any day not less than fourteen days from the date of the proclamation, notwithstanding any previous adjournment or prorogation to a more distant day.' [f]

A *dissolution* is the civil death of the parliament; and this may be effected three ways: 1. By the sovereign's will, expressed either in person or by representation. For, as the Crown has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power; as was fatally experienced by the unfortunate King Charles I., who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power which he himself had consented to give them. It is, therefore, extremely necessary that the Crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand, they may frequently and regularly come together for the dispatch of business, and redress of grievances; and may not, on the other, even with the consent of the Crown, be continued to an inconvenient or unconstitutional length. [188]

2. A parliament may be *dissolved* by the demise of the Crown. This dissolution formerly happened immediately upon the death of the reigning sovereign; for he being considered in law as the head of the parliament (*caput, principium, et finis*), that failing, the whole body was held to be extinct. But calling a new Parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 & 8 Wm. III. c. 15, and 6 Ann. c. 7, that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor: 'and by statute 37 Geo. IV. c. 127, that in case of [189]

[f] 37 Geo. III. c. 127; 39 & 40 Geo. III. c. 14.

the demise of the Crown between the dissolution of parliament and the day appointed for assembling a new parliament, the last parliament shall immediately convene and continue for six months unless sooner prorogued or dissolved by the successor; and in case of the demise of the Crown on or after the day appointed for the assembling a new parliament, but before it has actually met and sat, such new parliament shall immediately convene and sit, and may continue sitting for six months unless sooner prorogued or dissolved by the successor.'

3. Lastly, a parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual; or might last for the life of the prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy: but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again (whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others), will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit by the statute 6 W. & M. c. 2, was *three* years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute of 1 Geo. I. st. 2, c. 38 (in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion) this term was prolonged to *seven* years: and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year, if not sooner dissolved by the royal prerogative.

CHAPTER III.

OF THE SOVEREIGN AND HIS TITLE.

THE supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen; for it matters not to which sex the Crown descends: but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; as is declared by statute 1 Mar. st. 3, c. 1. [190]

In discoursing of the royal rights and authority, I shall consider the sovereign under six distinct views: 1. With regard to his title. 2. His royal family. 3. His councils. 4. His duties. 5. His prerogative. 6. His revenue. And first, with regard to his title.

1. His title.

The executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision *who* is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquillity, and to the consciences of private men, that this [191] rule should be clear and indisputable; and our constitution has not left us in the dark upon this material occasion. It will therefore be the endeavour of this chapter to trace out the constitutional doctrine of the royal succession, with that freedom and regard to truth, yet mixed with that reverence and respect, which the principles of liberty and the dignity of the subject require.

The grand fundamental maxim upon which the *jus coronæ*, or right of succession to the throne of these kingdoms, depends, I take to be this: "that the Crown is, by common law and

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"constitutional custom, hereditary; and this in a manner peculiar to itself; but that the right of inheritance may from time to time be changed or limited by Act of Parliament; under which limitations the Crown still continues hereditary." And this proposition it will be the business of this chapter to prove, in all its branches; first, that the Crown is hereditary; secondly, that it is hereditary in a manner peculiar to itself; thirdly, that this inheritance is subject to limitation by parliament; lastly, that when it is so limited, it is hereditary in the new proprietor.

The Crown hereditary;

1. First, it is in general *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective; and, as I believe there is no instance wherein the Crown of England has ever been asserted to be elective, except by the regicides at the infamous and unparalleled trial of King Charles I., it must of consequence be hereditary. Yet while I assert a hereditary, I by no means intend a *jure divino* title to the throne. Such a title may be allowed to have subsisted under the theocratic establishments of the children of Israel in Palestine, but it never yet subsisted in any other country, save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of Providence. Nor indeed have a *jure divino* and a *hereditary* right any necessary connexion with each other, as some have very weakly imagined.
[192] The titles of David and Jehu were equally *jure divino*, as those of either Solomon or Ahab; and yet David slew the sons of his predecessor, and Jehu his predecessor himself. And when our kings have the same warrant as they had, whether it be to sit upon the throne of their fathers, or to destroy the house of the preceding sovereign, they will then, and not before, possess the Crown of England by a right like theirs, *immediately* derived from heaven. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth; the municipal laws of one society having no connexion with, or influence upon, the fundamental polity of another. The founders of our English monarchy might perhaps, if they had thought proper, have made it an elective monarchy; but they rather chose,

but not jure divino.

and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent; and ripened by degrees into common law: the very same title that every private man has to his own estate. Lands are not naturally descendible any more than thrones; but the law has thought proper, for the benefit and peace of the public, to establish hereditary succession in the one as well as the other.

It must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, has usually been elective. And, if the individuals who compose that state could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a kingdom, as in other inferior communities. The best, the wisest, and the bravest man would then be sure of receiving that Crown, which his endowments had merited; and the sense of an unbiassed majority would be dutifully acquiesced in by the few who were of different opinions. But history and observation will inform us, that [193] elections of every kind (in the present state of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority. This is an evil to which all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has (by becoming such) virtually engaged to submit. Whereas in the great and independent society, which every nation composes, there is no superior to resort to but the law of nature; no method to redress the infringements of that law but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the

quarrel can only be decided by the law of arms; so in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal, is that of the God of battles; the only process by which the appeal can be carried on is that of a civil and intestine war. A hereditary succession to the Crown is therefore now established in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of ancient imperial Rome and the more modern experience of Poland and Germany, may show us are the consequences of elective kingdoms.

2. Succession the same as landed estates.

2. But, secondly, as to the particular mode of inheritance, it in general corresponds with the feudal path of descents, chalked out by the law in succession to landed estates. Like estates, the Crown will descend lineally to the issue of the [194] reigning monarch, as it did from King John to Richard II., through a regular pedigree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward V. succeeded to the Crown in preference to Richard his younger brother, and Elizabeth his elder sister. Like lands or tenements, the Crown, on failure of the male line, descends to the issue female. Thus Mary I. succeeded to Edward VI., and the line of Margaret Queen of Scots, the daughter of Henry VII., succeeded on failure of the line of Henry VIII., his son. But among the females, the Crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect; and therefore Queen Mary, on the death of her brother, succeeded to the Crown alone, and not in partnership with her sister Elizabeth. Again, the doctrine of representation prevails in the descent of the Crown, as it does in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Thus Richard II. succeeded his grandfather Edward III., in right of his father the Black Prince, to the exclusion of all his

uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the Crown goes to the next collateral relations of the late king; provided they are lineally descended from the blood-royal, that is, from that royal stock which originally acquired the Crown. Thus Henry I. succeeded to William II., John to Richard I., and James I. to Elizabeth, being all derived from the Conqueror, who was then the only regal stock.[a]

3. The doctrine of *hereditary* right does by no means imply an *indefeasible* right to the throne. No man will, I think, assert this, that has considered our laws, constitution, and history, without prejudice and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the sovereign and both houses of parliament, to defeat this hereditary right; and, by particular entails, limitations and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution; as may be gathered from the expression so frequently used in our statute book, of the "king's majesty, his heirs, and successors." In which we may observe, that as the word "heirs" necessarily implies an inheritance or hereditary right, generally subsisting in the royal person; so the word "successors" distinctly taken, must imply that this inheritance may sometimes be broken through, or that there may be a successor, without being the heir, of the king. And this is so extremely reasonable, that without such a power, lodged somewhere, our polity would be very defective. For let us barely suppose so melancholy a case, as that the heir apparent should be a lunatic, an idiot, or otherwise incapable of reigning; how miserable would the condition of the nation be, if he were also incapable of being set aside!

3. The title defeasible by Act of Parliament.

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[a] 'In the succession to the Crown there was no objection' (as, 'previously to the alteration of the law by the stat. 3 & 4 Will. IV. c. 106,' in the case of common descents) to the succession of a brother, an uncle, or other collateral relation, of the *half* blood (that is, where the relationship proceeds not from the same *couple* of ancestors, which constitutes a kinsman of the *whole* blood, but from a *single* ancestor only, as when two persons are derived from the same father, and not from the same mother, or *vice versâ*): provided only, that the one ancestor, from whom both were descended, was that from whose veins the blood-royal was communicated to each. Thus Mary I. inherited to Edward VI., and Elizabeth inherited to Mary; all children of the same father, king Henry VIII., but all by different mothers (Bl. Com. p. 195). 'Both of these queens, nevertheless, thought it advisable to confirm her hereditary title by an Act of Parliament.'

—It is therefore necessary that this power should be lodged somewhere; and yet the inheritance and regal dignity would be very precarious indeed, if this power were *expressly* and *avowedly* lodged in the hands of the subject only, to be exerted whenever prejudice, caprice, or discontent should happen
[196] to take the lead. Consequently it can nowhere be so properly lodged as in the two houses of parliament, by and with the consent of the reigning sovereign; who, it is not to be supposed, will agree to anything improperly prejudicial to the rights of his own descendants. And therefore in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. The Crown hereditary.

4. But, fourthly; however the Crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. And hence in our law the king is said never to die, in his political capacity; though, in common with other men, he is subject to mortality in his natural: because immediately upon the natural death of Henry, William, or Edward, the sovereign survives in his successor. For the right of the Crown vests, *eo instanti*, upon his heir; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum;* but, as Sir Matthew Hale[b] observes, the right of sovereignty is fully invested in the successor by the very descent of the Crown.[c] And therefore, however acquired, it becomes in him absolutely hereditary, unless by the rules of the limitation it is otherwise ordered and determined. In the same manner as landed estates, to continue our former comparison, are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heir-at-law; but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel, so limited and prescribed, and no other.

[b] 1 Hist. P. C. 61.

[c] 'Upon this principle the statutes passed in the first parliament of Charles II. are said to have been passed in the twelfth year of his reign, which was considered to begin in 1649, on the death of Charles I., and not in 1660, or the Restoration.'

In these four points consists, as I take it, the constitutional notion of hereditary right to the throne; which will be still farther elucidated, and made clear beyond all dispute, from a short historical view of the succession to the Crown of England, the doctrines of our ancient lawyers, and the several Acts of Parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar the hereditary title to the throne. And in the pursuit of this inquiry, we shall find, that from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above mentioned have ever been held constitutional canons of succession. It is true, the succession, through fraud, or force, or sometimes through necessity, when in hostile times the Crown descended on a minor or the like, has been very frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And, even in those instances where the succession has been violated, the Crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the people while they gained possession of the kingdom. And, when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted it or endeavoured to transmit it to their own posterity, by a kind of hereditary right of usurpation.

History of the succession to the Crown.

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King Egbert, about the year 800, found himself in possession of the throne of the West Saxons by a long and undisturbed descent from his ancestors of above three hundred years. How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of such high antiquity, as must render all inquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better. The other kingdoms of the Heptarchy he acquired, some by consent, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that when one country is united to another in such a manner, as that one keeps its government and states and the other loses them; the latter entirely assimilates with, or is

Egbert. A.D. 800.

[198] melted down in the former, and must adopt its laws and customs.[d] And in pursuance of this maxim there has ever been, since the union of the Heptarchy in King Egbert,[e] a general acquiescence under the hereditary monarchy of the West Saxons, through all the united kingdoms.

Edmund Ironside.

From Egbert to the death of Edmund Ironside, a period of above two hundred years, the Crown descended regularly through a succession of fifteen princes, without any deviation or interruption: save only that the sons of King Ethelwolf succeeded to each other in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the witena-gemote, in the heat of the Danish invasions: and also the King Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew, a minor, the times being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute, King of Denmark; and Canute, after his death, seized the whole of it, Edmund's son being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom, however, this new-acquired throne continued hereditary for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was restored in the person of Edward the Confessor.

Edward the Confessor.

He was not, indeed, the true heir to the Crown, being the younger brother of King Edmund Ironside, who had a son Edward, surnamed (from his exile) the Outlaw, still living. But this son was then in Hungary: and, the English having just shaken off the Danish yoke, it was necessary that somebody on the spot should mount the throne; and the Confessor
[199] was the next of the royal line then in England. On his decease without issue, Harold I. usurped the throne; and almost at the same instant came on the Norman invasion: the right to the Crown being all the time in Edgar, surnamed Atheling (which signifies in the Saxon language *illustrious*,

[d] Puff. L. of N. and N. b. 8, c. 12, § 6.

[e] See Turner's History of the Anglo-Saxons, b. iii. c. 11.

or of royal blood), who was the son of Edward the Outlaw, and grandson of Edmund Ironside; or, as Matthew Paris[f] well expresses the sense of our old constitution, "*Edmundus autem Latusferreum, rex naturalis de stirpe regum, genuit Edwardum; et Edwardus genuit Edgarum, cui de jure debebatur regnum Anglorum.*"

William the Conqueror.

William the Norman claimed the Crown by virtue of a pretended grant from King Edward the Confessor; a grant which, if real, was in itself utterly invalid; because it was made, as Harold well observed in his reply to William's demand,[g] "*absque generali senatus et populi conventu et edicto;*" which also very plainly implies, that it then was generally understood that the king, with consent of the general council, might dispose of the Crown, and change the line of succession. William's title, however, was altogether as good as Harold's, he being a mere private subject, and an utter stranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times; though frequently asserted by the English nobility after the Conquest, till such time as he died without issue: but all their attempts proved unsuccessful, and only served the more firmly to establish the Crown in the family which had newly acquired it.

This conquest, then, by William of Normandy was, like that of Canute before, a forcible transfer of the Crown of England into a new family; but, the Crown being so transferred, all the inherent properties of the Crown were with it transferred also. For, the victory obtained at Hastings not being a victory over the nation collectively,[h] but only over the person of Harold, the only right that the Conqueror could pretend to acquire thereby, was the right to possess the Crown of England, not to alter the nature of the government. And, therefore, as the English laws still remained in [200] force, he must necessarily take the Crown subject to those laws, and with all its inherent properties; the first and principal of which was its descendibility. Here then we must drop our race of Saxon kings, at least for a while, and derive our descents from William the Conqueror, as from a new stock, who acquired by right of war (such as it is, yet still

[f] A.D. 1066.
[g] William of Malmsb. l. 3.
[h] Hale, Hist. C. L. c. 5; Seld. Review of Tithes, c. 8.

the *dernier resort* of kings) a strong and undisputed title to the inheritable Crown of England.

William II. Accordingly, it descended from him to his sons William II. and Henry I. Robert, it must be owned, his eldest son, was kept out of possession by the arts and violence of his brethren: who perhaps might proceed upon a notion, which prevailed for some time in the law of descents (though never adopted as the rule of public successions),[i] that when the eldest son was already provided for (as Robert was constituted Henry I. Duke of Normandy by his father's will), in such a case the next brother was entitled to enjoy the rest of their father's inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have at first.

Stephen. Stephen of Blois, who succeeded him, was indeed the grandson of the Conqueror, by Adelicia, his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald, who was Earl of Blois, and therefore seems to have waived, as he certainly never insisted on, so troublesome and precarious a claim. The real right was in the Empress Matilda or Maud, the daughter of Henry I.; the rule of succession being (where women are admitted at all), that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper; and therefore, he rather chose to rely on a title by election,[j] while the Em-
[201] press Maud did not fail to assert her hereditary right by the sword; which dispute was attended with various success, and ended at last in the compromise made at Wallingford, that Stephen should keep the Crown, but that Henry, the son of Maud, should succeed him, as he afterwards accordingly did.

Henry II. Henry, the second of that name, was (next after his mother Matilda) the undoubted heir of William the Conqueror; but he had also another connexion in blood, which endeared him still farther to the English. He was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary

[i] Lyttleton's Life of Hen. II. v. i. p. 467.

[j] "*Ego Stephanus Dei gratiâ assensu cleri et populi in regem Anglorum electus*, &c." (Cart. A.D. 1136: Ric. de Hagustald. 314; Hearne ad Guil. Neubr. 711.)

kings. For Edward the Outlaw, the son of Edmund Ironside, had (besides Edgar Atheling, who died without issue) a daughter Margaret, who was married to Malcolm, King of Scotland; and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda, the wife of Henry I., who by him had the Empress Maud, the mother of Henry II. Upon which account the Saxon line is in our histories frequently said to have been restored in his person: though in reality, that right subsisted in the *sons* of Malcolm by Queen Margaret; King Henry's best title being as heir to the Conqueror.

From Henry II., the Crown descended to his eldest son, Richard I. Richard I., who dying childless, the right vested in his nephew Arthur, the son of Geoffrey his next brother: but John, the youngest son of King Henry, seized the throne; claiming, as appears from his charters, the Crown by hereditary right:[k] that is to say, he was next of kin to the deceased king, being his surviving brother: whereas Arthur John. was removed one degree farther, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents has now been settled for so many centuries, they were sufficient to puzzle the understandings of our brave, but unlettered ancestors. Nor [202] indeed, can we wonder at the number of partisans, who espoused the pretensions of King John in particular; since, even in the reign of his father King Henry II., it was a point undetermined;[l] whether, even in common inheritances, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood. However, on the death of Arthur and Henry III. his sister Eleanor without issue, a clear and indisputable title vested in Henry III., the son of John: and from him to Richard the Second, a succession of six generations, the Crown descended in the true hereditary line. Under one of which Richard II. race of princes, we find it declared in Parliament (25 Edw. III. st. 2), "that the law of the Crown of England is, and always

[k] "— *Regni Angliæ; quod nobis jure competit hæreditario.*" (Spelm. Hist. R. Joh. apud Wilkins, 354.)

[l] Glanv. l. 7, c. 3.

"hath been, that the children of the king of England, whe-"ther born in England or elsewhere, ought to bear the inhe-"ritance after the death of their ancestors. Which law our "sovereign lord the king, the prelates, earls, and barons, and "other great men, together with all the commons in parlia-"ment assembled, do approve and affirm for ever."

Upon Richard the Second's resignation of the Crown, he having no children, the right reverted to the issue of his grandfather, Edward III. That king had many children, besides his eldest, Edward the Black Prince of Wales, the father of Richard II.: but to avoid confusion I shall only mention three: William, his second son, who died without issue; Lionel, Duke of Clarence, his third son; and John of Gaunt, Duke of Lancaster, his fourth. By the rules of succession, therefore, the posterity of Lionel, Duke of Clarence, were entitled to the throne upon the resignation of King Richard; and had accordingly been declared by the king, many years before, the presumptive heirs of the Crown: which declaration was also confirmed in Parliament.[m] But Henry, Duke of
[203] Lancaster, the son of John of Gaunt, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety; and he became king under the title of
Henry IV. Henry IV. But, as Sir Matthew Hale remarks,[n] though the people unjustly assisted Henry IV. in his usurpation of the Crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror (which he very much inclined to do),[o] but as a successor, descended by right line of the blood royal; as appears from the rolls of parliament in those times. And in order to this he set up a show of two titles: the one upon the pretence of being the first of the blood royal in the entire male line, whereas the Duke of Clarence left only one daughter, Philippa; from which female branch, by a marriage with Edmund Mortimer, Earl of March, the house of York descended; the other, by reviving an exploded rumour, first propagated by John of Gaunt, that Edmund, Earl of Lancaster (to whom Henry's mother was

[m] Sandford's Gen. Hist. 246.
[n] Hist. C. L. c. 5.
[o] Seld. Tit. Hon. 1, 3.

heiress) was in reality the elder brother of King Edward I.; though his parents, on account of his personal deformity, had imposed him on the world for the younger; and therefore Henry would be entitled to the Crown, either as successor to Richard II., in case the entire male line was allowed a preference to the female, or, even prior to that unfortunate prince, if the Crown could descend through a female, while an entire male line was existing.

However, as in Edward the Third's time we find the parliament approving and affirming the law of the Crown, as before stated, so in the reign of Henry IV., they actually exerted their right of new-settling the succession to the Crown. And this was done by the statute 7 Hen. IV. c. 2, whereby it is enacted, "that the inheritance of the Crown "and realms of England and France, and all other the king's "dominions, shall be *set and remain*[p] in the person of our "sovereign lord the king, and in the heirs of his body issuing;" and Prince Henry is declared heir-apparent to the Crown, to hold to him and the heirs of his body issuing, with remainder to Lord Thomas, Lord John, and Lord Humphry, the king's sons, and the heirs of their bodies respectively, which is indeed, nothing more than the law would have done before, provided Henry the Fourth had been a rightful king. It, however, serves to show that it was then generally understood that the king and parliament had a right to new-model and regulate the succession to the Crown: and we may also observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However, Sir Edward Coke more than once expressly declares,[q] that at the time of passing this Act, the right of the Crown was in the descent from Philippa, daughter and heir of Lionel, Duke of Clarence.

Henry IV.

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Nevertheless the Crown descended regularly from Henry IV. to his son and grandson, Henry V. and VI.; in the latter of whose reigns the house of York asserted their dormant title; and, after embruing the kingdom in blood and confusion for seven years together, at last established it in the person of Edward IV. At his accession to the throne, after a breach of the succession that continued for three descents,

Henry V. Henry VI. Edward IV.

[p] *Soit mye et demoerge.*

[q] 4 Inst. 37, 205.

and above threescore years, the distinction of a king *de jure* and a king *de facto* began to be first taken; in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom by confirming all honours conferred and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In the statute 1 Edw. IV. c. 1, the three Henrys are styled, "late kings of England successively in dede, and not of ryght." And, in all the charters which I have met with of King Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ.*"

Edward V. Edward IV. left two sons and a daughter; the eldest of which sons, King Edward V. enjoyed the regal dignity for a very short time, and was then deposed by Richard, his unnatural uncle, who immediately usurped the royal dignity having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV., to make a show of
[205] some hereditary title; after which he is generally believed to have murdered his two nephews, upon whose death the right of the Crown devolved to their sister Elizabeth.

Richard III. The tyrannical reign of King Richard III. gave occasion to Henry Earl of Richmond to assert his title to the Crown; a title the most remote and unaccountable that was ever set up, and which nothing could have given success to, but the universal detestation of the then usurper Richard. For, besides that he claimed under a descent from John of Gaunt, whose title was now exploded, the claim (such as it was) was through John Earl of Somerset, a bastard son, begotten by John of Gaunt upon Catherine Swinford. It is true, that by an Act of Parliament, 20 Rich. II., this son was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock: but still with an express reservation of the Crown, "*exceptâ dignitate regali.*"[r]

Henry VII. Notwithstanding all this, immediately after the battle of Bosworth Field, he assumed the regal dignity; the right of the Crown then being, as Sir Edward Coke expressly declares,[s] in Elizabeth, eldest daughter of Edward IV.: and his possession was established by parliament, holden the first year of

[r] 4 Inst. 36. [s] 4 Inst. 37.

his reign. In the Act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV.; and therefore (as Lord Bacon, the historian of this reign, observes) carefully avoided any recognition of Henry VII.'s right, which indeed was none at all; and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle way was rather chosen, by way (as the noble historian expresses it) of *establishment*, and that under covert and indifferent words, "that the inheritance of the Crown should *rest, remain*, and *abide* in King Henry VII. and the heirs of his body:" thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon after married [206] Elizabeth of York, the undoubted heiress of the Conqueror, and thereby gained (as Sir Edward Coke declares[t]) by much his best title to the Crown. Whereupon the Act made in his favour was so much disregarded, that it never was printed in our statute books.

Henry the Eighth, the issue of this marriage, succeeded to the Crown by clear indisputable hereditary right, and transmitted it to his three children in successive order. But in his reign we, at several times, find the parliament busy in regulating the succession to the kingdom. And, first, by statute 25 Henry VIII. c. 12, which recites the mischiefs which have and may ensue by disputed titles, because no perfect and substantial provision hath been made by law concerning the succession; and then enacts, "that the Crown shall be entailed "to his majesty, and the sons or heirs male of his body; and "in default of such sons to the Lady Elizabeth (who is de- "clared to be the king's eldest issue female, in exclusion of "the Lady Mary, on account of her supposed illegitimacy by "the divorce of her mother Queen Catherine) and to the Lady "Elizabeth's heirs of her body; and so on from issue female "to issue female, and the heirs of their bodies, by course of "inheritance according to their ages, *as the Crown of England* "*hath been accustomed and ought to go*, in case where there be "heirs female of the same: and in default of issue female,

Henry VIII.

[t] 4 Inst. 37.

"then to the king's right heirs for ever." This single statute is an ample proof of all the four positions we at first set out with.

But upon the king's divorce from Ann Boleyn, this statute was, with regard to the settlement of the Crown, repealed by statute 28 Hen. VIII. c. 7; wherein the Lady Elizabeth is also, as well as the Lady Mary, bastardized, and the Crown settled on the king's children by Queen Jane Seymour, and his future wives; and, in defect of such children, then with this remarkable remainder, to such persons as the king by letters patent, or last will and testament, should limit and ap-
[207] point the same. A vast power; but, notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. VIII. c. 1, the king's two daughters are legitimated again, and the Crown is limited to Prince Edward by name, after that to the Lady Mary, and then to the Lady Elizabeth, and the heirs of

Edward VI.

their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the Crown.

Mary.

But lest there should remain any doubt in the minds of the people, through this jumble of Acts for limiting the succession, by statute 1 Mar. st. 2, c. 1, Queen Mary's hereditary right to the throne is acknowledged and recognised in these words: "the Crown of these realms is most lawfully, justly, and "rightly *descended* and come to the queen's highness that now "is, being the very, true, and undoubted heir and inheritrix "thereof." And again, upon the queen's marriage with Philip of Spain, in the statute which settles the preliminaries of that match, the hereditary right to the Crown is thus asserted and declared: "as touching the right of the queen's inheritance "in the realm and dominions of England, the children, "whether male or female, shall succeed in them, according to "the known laws, statutes, and customs of the same." Which determination of the parliament, that the succession *shall* continue in the usual course, seems tacitly to imply a power of new-modelling and altering it, in case the legislature had thought proper.

Elizabeth

On Queen Elizabeth's accession, her right is recognised in still stronger terms than her sister's; the parliament acknow-

lodging, "that the queen's highness is, and in very deed and "of most mere right ought to be, by the laws of God, and "the laws and statutes of this realm, our most lawful and "rightful sovereign liege lady and queen: and that her high- [208] "ness is rightly, lineally, and lawfully descended and come of "the blood royal of this realm of England; in and to whose "princely person, and to the heirs of her body lawfully to be "begotten, after her, the imperial crown and dignity of this "realm doth belong." And in the same reign, by statute 13 Eliz. c. 1, we find the right of parliament to direct the succession of the Crown asserted in the most explicit words. "If "any person shall hold, affirm, or maintain that the common "laws of this realm, not altered by parliament, ought not to "direct the right of the Crown of England; or that the "queen's majesty, with and by the authority of parliament, is "not able to make laws and statutes of sufficient force and "validity, to limit and bind the Crown of this realm, and the "descent, limitation, inheritance, and government thereof;— "such person, so holding, affirming, or maintaining, shall, "during the life of the queen, be guilty of high treason; and "after her decease shall be guilty of a misdemeanor, and forfeit his goods and chattels."

On the death of Queen Elizabeth, without issue, the line of James I. Henry VIII. became extinct. It therefore became necessary to recur to the other issue of Henry VII. by Elizabeth of York his queen; whose eldest daughter Margaret having married James IV. king of Scotland, King James the Sixth of Scotland, and of England the First, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry VIII., centered all the claims of different competitors, from the Conquest downwards, he being indisputably the lineal heir of the Conqueror. And, what is still more remarkable, in his person also centered the right of the Saxon monarchs which had been suspended from the Conquest till his accession. For, as was formerly observed, Margaret, the sister of Edgar Atheling, the daughter of Edward the Outlaw, and granddaughter of King Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the Conquest, resided. She married Malcolm king of Scotland; and Henry II., by a descent from Matilda their daughter, is generally called the restorer of the Saxon line. [209]

But it must be remembered, that Malcolm by his Saxon queen had sons as well as daughters: and that the royal family of Scotland from that time downwards were the offspring of Malcolm and Margaret. Of this royal family King James the First was the direct lineal heir, and therefore united in his person every possible claim by hereditary right to the English as well as Scottish throne, being the heir both of Egbert and William the Conqueror.

And it is no wonder that a prince of more learning than wisdom, who could deduce a hereditary title for more than eight hundred years, should easily be taught by the flatterers of the times, to believe there was something divine in this right, and that the finger of Providence was visible in its preservation. Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him no natural, but a positive right. And in this and no other light was it taken by the English parliament; who by statute 1 Jac. I. c. 1, did "recognise and acknowledge, that immediately upon "the dissolution and decease of Elizabeth late queen of England, the imperial crown thereof did by inherent birthright, "and lawful and undoubted succession, descend and come to "his most excellent majesty, as being lineally, justly, and "lawfully, next and sole heir of the blood royal of this realm." Not a word here of any right immediately derived from heaven: which, if it existed anywhere, must be sought for among the *aborigines* of the island, the ancient Britons; among whose princes indeed some have gone to search it for him.[u]

Charles I. But, wild and absurd as the doctrine of divine right most undoubtedly is, it is still more astonishing, that when so many human hereditary rights had centered in this king, his son
[210] and heir King Charles the First should be told by those infamous judges who pronounced his unparalleled sentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness, which followed the fatal catastrophe of that pious and unfortunate

[u] Elizabeth of York, the mother of Queen Margaret of Scotland, was heiress of the house of Mortimer. And Carte observes, that the house of Mortimer, in virtue of its descent from Gladys, only sister to Lewellin ap Jorwerth the Great, had the true right to the principality of Wales. (Hist. Eng. iii. 705.)

prince, will be a standing argument in favour of hereditary monarchy to all future ages, as they proved at last to the then deluded people: who, in order to recover that peace and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the estates restored the right heir of the Crown. And in the proclamation for that purpose, which was drawn up and attended by both houses,[v] they declared, "that according to their duty and allegiance, "they did heartily, joyfully, and unanimously acknowledge "and proclaim, that immediately upon the decease of our late "sovereign lord King Charles, the imperial crown of these "realms did by inherent birthright, and lawful and undoubted "succession, descend and come to his most excellent majesty "Charles the Second, as being lineally, justly, and lawfully, Charles II. "next heir of the blood royal of this realm: and thereunto "they most humbly and faithfully did submit and oblige "themselves, their heirs, and posterity for ever."

Thus I think it clearly appears, from the highest authority this nation is acquainted with, that the Crown of England has ever been a hereditary crown; though subject to limitations by parliament. The remainder of this chapter will consist principally of those instances, wherein the parliament has asserted or exercised this right of altering and limiting the succession: a right which, we have seen, was before exercised and asserted in the reigns of Henry IV., Henry VII., Henry VIII., Queen Mary, and Queen Elizabeth.

Alterations in the succession.

The first instance, in point of time, is the famous bill of exclusion, which raised such a ferment in the latter end of the reign of King Charles the Second. It is well known that the purport of this bill was to have set aside the king's brother and presumptive heir, the Duke of York, from the succession, [211] on the score of his being a papist; that it passed the House of Commons, but was rejected by the lords; the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things: 1. That the Crown was universally acknowledged to be hereditary; and the inheritance indefeasible unless by parliament: else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the

[v] Com. Journ. 8 May, 1660.

inheritance: else such a bill had been ineffectual.[w] The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the power, but merely the propriety James II. of an exclusion. However, as the bill took no effect, King James the Second succeeded to the throne of his ancestors: and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which (with other concurrent circumstances) brought on the Revolution in 1688.

Revolution of 1688. The true ground and principle upon which that memorable event proceeded, was an entirely new case in politics, which had never before happened in our history; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeazance of the right of succession, and a new limitation of the Crown, by the king and both houses of parliament; it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses[x] came to this resolution: "that King James the Second, having endeavoured to subvert "the constitution of the kingdom, by breaking the original "contract between king and people; and by the advice of "jesuits and other wicked persons, having violated the funda- "mental laws; and having withdrawn himself out of this "kingdom; has abdicated the government, and that the
[212] "throne is thereby vacant."[y] Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the Conquest had lasted above six hundred years, and from the union of the heptarchy in King Egbert almost nine hundred. The facts themselves thus appealed to, the king's endeavour to subvert the constitution by

[w] See Hallam's Const. Hist. v. ii. ch. 12.

[x] Com. Journ. 7 Feb. 1688.

[y] The convention in Scotland drew the same conclusion, viz., the vacancy of the throne, from premises and in language much more bold and intelligible: "The estates of the kingdom of Scotland find and declare, that King James the Seventh, being a professed papist, did assume the royal power, and acted as a king, without ever taking the oath required by law; and had, by the advice of evil and wicked counsellors, invaded the fundamental constitution of this kingdom, and altered it from a legal and limited monarchy to an arbitrary despotic power, and had governed the same to the subversion of the Protestant religion and violation of the laws and liberties of the nation, inverting all the ends of government, whereby he had forefaulted the Crown, and the throne became vacant."—[CHRISTIAN.]

breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious; and the consequences drawn from these facts (namely, that they amounted to an abdication of the government; which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine. For whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself; there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society. The reasons upon which they decided may be found at large in the parliamentary proceedings of the times; and may be matter of instructive amusement for us to contemplate, as a speculative point of history. But care must be taken not to carry this inquiry farther, than merely for instruction or amusement. The idea, that the consciences of posterity were concerned in the rectitude of their ancestors' decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are happily extinguished. I therefore rather choose to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expediency: because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient. Whereas, our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty at this distance of time to acquiesce in their determination, being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it. [213]

But, while we rest this fundamental transaction, in point of authority, upon grounds the least liable to cavil, we are bound both in justice and gratitude to add, that it was conducted with a temper and moderation, which naturally arose from its equity; that, however it might in some respects go beyond the letter of our ancient laws (the reason of which will more

fully appear hereafter), it was agreeable to the spirit of our constitution, and the rights of human nature; and that though in other points (owing to the peculiar circumstances of things and persons) it was not altogether so perfect as might have been wished, yet from thence a new era commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of English history. In particular it is worthy of observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of King James amounted to an *endeavour* to subvert the constitution; and not to an actual subversion, or total dissolution, of the government, according to the principles of Locke:[y] which would have reduced the society almost to a state of nature; would have levelled all distinctions of honour, rank, offices, and property; would have annihilated the sovereign power, and in consequence have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity. They therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne; whereby the government was allowed to subsist, though the executive magistrate was gone, and the kingly office to remain, though King James was no
[214] longer king. And thus the constitution was kept entire; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.

This single postulatum, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For, if the throne be at any time vacant (which may happen by other means besides that of abdication; as if all the blood royal should fail, without any successor appointed by parliament); if, I say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems

[y] On Gov. p. 2, c. 19.

naturally to result to the lords and commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be intrusted; and there is a necessity of its being intrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such a manner as they judged the most proper. And this was done by their declaration of 12 February, 1688,[z] in the following manner: "That William "and Mary, Prince and Princess of Orange, be, and be de- "clared king and queen, to hold the Crown and royal dignity "during their lives, and the life of the survivor of them; and "that the sole and full exercise of the regal power be only in, "and executed by, the said Prince of Orange, in the names "of the said prince and princess, during their joint lives: and "after their deceases the said Crown and royal dignity to be "to the heirs of the body of the said princess; and for default "of such issue to the Princess Anne of Denmark and the heirs "of her body; and for default of such issue to the heirs of "the body of the said Prince of Orange."

William and Mary.

[215] Perhaps, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood, but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any farther from the ancient line than temporary necessity and self-preservation required. They therefore settled the Crown, first on King William and Queen Mary, King James's eldest daughter, for their joint lives: then on the survivor of them, and then on the issue of Queen Mary: upon failure of such issue, it was limited to the Princess Anne, King James's second daughter, and her issue; and lastly, on failure of that to the issue of King William, who was the grandson of Charles the First, and nephew as well as son-in-law of King James the Second, being the son of Mary his eldest sister. This settlement included all the Protestant posterity of King Charles I., except such other issue as King James might at any time have, which was totally omitted,

[z] Com. Journ 12 Feb. 1688.

through fear of a popish succession. And this order of succession took effect accordingly.

These three princes therefore, King William, Queen Mary, and Queen Anne, did not take the Crown by hereditary right or *descent*, but by way of donation or *purchase*, as the lawyers call it; by which they mean any method of acquiring an estate otherwise than by descent. The new settlement did not merely consist in excluding King James, and the person pretended to be Prince of Wales, and then suffering the Crown to descend in the old hereditary channel; for the usual course of descent was in some instances broken through, and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and King James had left no other issue than his two daughters Queen Mary and Queen Anne. It would have stood thus: Queen Mary and her issue; Queen Anne and her issue; King William [216] and his issue. But we may remember that Queen Mary was only nominally queen, jointly with her husband King William, who alone had the regal power; and King William was personally preferred to Queen Anne, though his issue was postponed to hers. Clearly therefore these princes were successively in possession of the Crown by a title different from the usual course of descent.

William III.

It was towards the end of King William's reign, when all hopes of any surviving issue from any of these princes died with the Duke of Gloucester, that the king and parliament thought it necessary again to exert their power of limiting and appointing the succession, in order to prevent another vacancy of the throne, which must have ensued upon their deaths, as no farther provision was made at the Revolution, than for the issue of Queen Mary, Queen Anne, and King William. The parliament had previously, by the statute of 1 W. & M. st. 2, c. 2, enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, should profess the popish religion, or should marry a papist, should be excluded and be for ever incapable to inherit, possess, or enjoy the Crown; and that in such case the people should be absolved from their allegiance, and the Crown should descend to such persons, being Protestants, as would have inherited the same, in case the person so reconciled,

holding communion, professing, or marrying, were naturally dead. To act therefore consistently with themselves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the Princess Sophia, electress and Duchess Dowager of Hanover, the most accomplished princess of her age.[b] For, upon the impending extinction of the Protestant posterity of Charles the First, the old law of regal descent directed them to recur to the descendants of James the First; and the Princess Sophia, being the youngest daughter of Elizabeth Queen [217] of Bohemia, who was the daughter of James the First, was the nearest of the ancient blood royal who was not incapacitated by professing the popish religion. On her therefore, and the heirs of her body, being Protestants, the remainder of the Crown, expectant on the death of King William and Queen Anne, without issue, was settled by statute 12 & 13 Wm. III. c. 2. And at the same time it was enacted that whosoever should hereafter come to the possession of the Crown should join in the communion of the church of England as by law established.

This is the last limitation of the Crown that has been made by parliament: and these several actual limitations, from the time of Henry IV. to the present, do clearly prove the power of the sovereign and parliament to new-model or alter the succession. And indeed it is now again made highly penal to dispute it; for by the statute 6 Ann. c. 7, it is enacted, that if any person maliciously, advisedly, and directly shall maintain, by writing or printing, that the kings of this realm with the authority of parliament are not able to make laws to bind the Crown and the descent thereof, he shall be guilty of high treason; or if he maintains the same by only preaching, teaching, or advised speaking, he shall incur the penalties of a *præmunire.*

The Princess Sophia dying before Queen Anne, the in- Anne. heritance thus limited descended on her son and heir King George the First, and having on the death of the queen taken George I. effect in his person, from him it descended to King George George II.

[b] Sandford, in his Genealogical History, published A.D. 1677, speaking (page 535) of the Princesses Elizabeth, Louisa, and Sophia, daughters of the Queen of Bohemia, says, the first was reputed the most learned, the second the greatest artist, and the last, one of the most accomplished ladies in Europe.

the Second; and from him to his grandson and heir, King George the Third. 'From him again it descended to his eldest son, King George the Fourth, who dying without issue was succeeded by King William the Fourth, the third son of King George the Third; the second son Frederick Augustus, Duke of York, having previously died without issue. On the death of King William the Fourth, the inheritance descended to the only child of Edward Duke of Kent, the fourth son of King George the Third, our present gracious sovereign Queen Victoria.'

George III.
George IV.
William IV.

Hence it is easy to collect, that the title to the Crown is at present hereditary, though not quite so absolutely hereditary as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was King Egbert; then William the Conqueror; afterwards in James the First's time the two common stocks united, and so continued till the vacancy of the throne in 1688: now it is the Princess Sophia, in whom the [218] inheritance was vested by the new king and parliament. Formerly the descent was absolute, and the Crown went to the next heir without any restriction; but now, upon the new settlement, the inheritance is conditional, being limited to such heirs only of the body of the Princess Sophia, as are Protestant members of the Church of England, and are married to none but Protestants.

And in this due medium consists, I apprehend, the true constitutional notion of the right of succession to the imperial Crown of these kingdoms. The extremes between which it steers, are each of them equally destructive of those ends for which societies were formed and are kept on foot. Where the magistrate, upon every succession, is elected by the people, and may by the express provision of the laws be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such a hereditary right, as our laws have created and vested in the

royal stock, is closely interwoven with those liberties which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent. It was the duty of an expounder of our laws to lay this constitution before the student in its true and genuine light: it is the duty of every good Englishman to understand, to revere, to defend it.

CHAPTER IV.

OF THE ROYAL FAMILY.

[219] THE first and most considerable branch of the royal family, regarded by the laws of England ('supposing the sovereign to be a king'), is the *queen*.

Queen regent, The Queen of England is either queen *regent*, queen *consort*, or queen *dowager*. The queen *regent, regnant*, or *sovereign*, is she who holds the Crown in her own right; as the first (and perhaps the second) Queen Mary, Queen Elizabeth, Queen Anne, 'and our present gracious sovereign Queen Victoria;' and such a one has the same powers, prerogatives, rights, dignities and duties, as if she had been a king. This was observed in the entrance of the last chapter, and is expressly declared by statute 1 Mar. I. st. 3, c. 1. But the

Queen consort, queen *consort* is the wife of the reigning king; and she, by virtue of her marriage, is participant of divers prerogatives above other women.[a]

[220] Her separate and distinct rights. And first, she is a public person, exempt and distinct from the king: and not, like other married women, so closely connected as to have lost all legal or separate existence, so long as the marriage continues. For the queen is of ability to purchase lands, and to convey 'or devise them,' to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord: which no other married woman can do;[b] a privilege as old as the Saxon era.[c] She is also capable of taking a grant from the king, which no other wife is from her husband; and in this particular she agrees with the *Augusta*, or *piissima regina conjux divi imperatoris* of the Roman laws; who, according to Justinian,[d] was equally capable of making a grant to, and receiving one from, the emperor. The Queen of England has separate courts and offices distinct from the king's, not only in matters of ceremony, but even of law; and her attorney and solicitor

[a] Finch, L. 86.
[b] 4 Rep. 23.
[c] Seld. Jan. Angl. 1, 42.
[d] Cod. 5, 16, 26.

general are entitled to place within the bar of His Majesty's courts, together with the king's counsel.[e] She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will.[f] In short, she is in all legal proceedings looked upon as a feme-sole, and not as a feme-covert; as a single, not as a married woman.[g] For which the reason given by Sir Edward Coke is this: because the wisdom of the common law would not have the king (whose continual care and study is for the public, and *circa ardua regni*) to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman.

Her exemptions.

The queen has also many exemptions, and minute prerogatives. For instance: she pays no toll;[h] nor is she liable to any amercement in any court.[i] But in general, unless where the law has expressly declared her exempted, [221] she is upon the same footing with other subjects; being to all intents and purposes the king's subject, and not his equal; in like manner as, in the imperial law, "*Augusta legibus soluta non est.*"[j]

Her revenue.

The queen has also some pecuniary advantages, which form her distinct revenue: as, in the first place, she is entitled to an ancient perquisite called queen-gold, or *aurum reginæ;* which is a royal revenue, belonging to every queen consort during her marriage with the king, and due from every person who has made a voluntary offering or fine to the king amounting to ten marks or upwards, for and in consideration of any privileges, grants, licenses, pardons, or other matter of royal favour conferred upon him by the king: and it is due in the proportion of one-tenth part more over and above the entire offering or fine made to the king; and becomes an actual debt of record to the queen's majesty by the mere recording of the fine.[k] As, if

[e] Seld Tit. Hon. 1, 6, 7.

[f] 39 & 40 Geo. III. c. 88, s. 89. If the queen consort neglects to dispose of the goods, they go to the king her husband. (Wood's Inst. p. 22.)

[g] Finch, L. 86: Co. Litt. 133.

[h] Co. Litt. 133.

[i] Finch, L. 185.

[j] Ff. 1, 3, 31.

[k] Pryn. Aur. Reg. 2.

a hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chase, or free-warren: there the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginæ*.[l] But no such payment is due for any aids or subsidies granted to the king in parliament or convocation; nor for fines imposed by courts on offenders against their will; nor for voluntary presents to the king without any consideration moving from him to the subject; nor for any sale or contract whereby the present revenues or possessions of the Crown are granted away or diminished.[m]

The original revenue of our ancient queens, before and soon after the Conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the Crown,
[222] which were expressly appropriated to her Majesty, distinct from the king. It is frequent in Domesday Book, after specifying the rent due to the Crown, to add likewise the quantity of gold or other renders reserved to the queen.[n] These were frequently appropriated to particular purposes: to buy wool for her Majesty's use,[o] to purchase oil for her lamps,[p] or to furnish her attire from head to foot,[q] which was frequently very costly, as one single robe in the fifth year of Henry II. stood the city of London in upwards of fourscore pounds.[r] A practice somewhat similar to that of the eastern countries, where whole cities and provinces were specifically assigned to purchase particular parts of the queen's apparel.[s] And, for a farther addition to her income, this duty of queen-gold is supposed to have been originally granted; those

[l] 12 Rep. 21; 4 Inst. 358.

[m] Ibid. Pryn. 6; Madox. Hist. Exch. 242.

[n] *Bedefordscire Maner. Lestone redd. per annum xxii lib. &c., ad opus reginæ ii uncias auri.—— Herefordscire. In Lene, &c. consuetud. ut præpositus manerii veniente dominâ suâ (reginâ) in maner., præsentaret ei xviii oras denar. ut esset ipsa læto animo.* (Pryn. Append. to Aur. Reg. 2, 3.)

[o] *Causâ coadunandi lanam reginæ.* (Domesd. ibid.)

[p] *Civitas Lundon. Pro oleo ad lampad. reginæ.* (Mag. Rot. Pip. temp. Hen. II. ibid.)

[q] *Vicecomes Berkscire, xvi l. pro cappâ reginæ.* (Mag. Rot Pip. 19; 22 Hen. II. ibid.) *Civitas Lund. cordubanario reginæ xx s.* (Mag. Rot. 2 Hen. II. Madox. Hist. Exch. 419.)

[r] *Pro robâ ad opus reginæ quater xx. l. & vi s. viii d.* (Mag. Rot. 5 Hen. II. ibid. 250.)

[s] *Solere aiunt barbaros reges Persarum ac Syrorum—uxoribus civitates attribuere, hoc modo; hæc civitas mulieri redimiculum præbeat, hæc in collum, hæc in crines, &c.* (Cic. in Verrem. l. 3, c. 33.)

matters of grace and favour, out of which it arose, being frequently obtained from the Crown by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the Book of Domesday and in the great pipe-roll of Henry the First.[t] In the reign of Henry the Second, the manner of collecting it appears to have been well understood, and it forms a distinct head in the ancient Dialogue of the Exchequer,[u] written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen consorts of England till the death of Henry VIII.; though after the accession of the Tudor family, the collecting of it seems to have been much neglected: and, [223] there being no queen consorts afterwards till the accession of James I., a period of nearly sixty years, its very nature and quantity became then a matter of doubt: and being referred by the king to the chief justices and chief baron, their report of it was so very unfavourable,[v] that his consort Queen Anne (though she claimed it) yet never thought proper to exact it. In 1635, 11 Car. I., a time fertile of expedients for raising money upon dormant precedents in our old records (of which ship-money was a fatal instance), the king, at the petition of his queen Henrietta Maria, issued out his writ[w] for levying it: but afterwards purchased it of his consort at the price of ten thousand pounds; finding it, perhaps, too trifling and troublesome to levy. And when afterwards, at the Restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Prynne, by a treatise which does honour to his abilities as a painstaking and judicious antiquary, endeavour to excite Queen Catherine to revive this antiquated claim.

Another ancient perquisite belonging to the queen consort, mentioned by all our old writers,[x] and therefore only worthy notice, is this: that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and

[t] See Madox, Disceptat. Epistolar. 74; Pryn. Aur. Reg. Append. 5.

[u] Lib. 2, c. 26.

[v] Prynne, with some appearance of reason, insinuates that their researches were very superficial. (Aur. Reg. 125.)

[w] Rym. Fœd. 721.

[x] Bracton, l. 3, c. 3; Britton, c. 17; Flet. l. 1, c. 45 & 46.

queen; the head only being the king's property, and the tail of it the queen's. "*De sturgione observetur, quod rex illum habebit integrum: de balena vero sufficit si rex habeat caput, et regina caudam.*" The reason of this whimsical division, assigned by our ancient records,[y] was to furnish the queen's wardrobe with whalebone, 'a reason' (as Mr. Christian has observed) 'more whimsical than the division itself, as the whalebone lies entirely in the head.'

But farther: though the queen is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the statute 25 Edw. III.) to compass or imagine the death of [224] our lady the king's companion, as of the king himself: and to violate, or defile the queen consort, amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry the Eighth made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof; but this law was soon after repealed, it trespassing too strongly, as well on natural justice, as female modesty.[z] If, however, the queen be accused of any species of treason, she shall (whether consort or dowager) be tried by the peers of Parliament, as queen Ann Boleyn was in 28 Henry VIII.[a]

The husband of the queen.

The husband of a queen regnant, as Prince George of Denmark was to Queen Anne, or Prince Albert is to her present Majesty, is her subject;[b] and may be guilty of high treason

[y] Pryn. Aur. Reg. 127.

[z] 33 Hen. VIII. c. 21; 1 Edw. VI. c. 12.

[a] 'The proceedings against Queen Caroline in 1 Geo. IV. were in the nature of an ordinary Bill in Parliament.'

[b] 'By stat. 3 & 4 Vict. cc. 1 & 2, his Royal Highness was naturalized, subject to the condition of taking the oaths of allegiance and supremacy before the lord chancellor. By stat. 3 & 4 Vict. c. 3, her Majesty was empowered to grant to his Royal Highness an annuity of 30,000*l.* per annum; and it is enacted that his Royal Highness shall not become entitled by his marriage to any property, real or personal, to which her Majesty may be entitled. By stat. 3 & 4 Vict. c. 52, s. 1, if, on the demise of the Queen, there shall be issue of her Majesty, who shall become king or queen under eighteen years of age, his Royal Highness shall be guardian of such issue, and shall exercise the royal authority under the title of Regent. Before entering on which office, he is required to take the oaths of allegiance and supremacy, the oath of abjuration (6 Geo. III. c. 53), and a special oath for the due execution of the said office. As regent he cannot give the royal assent to any bill for altering the succession to the crown, or for the repeal or alteration of the Uniformity Act (13 & 14 Car. II. c. 4), or the Act for the Security of the Established Church of Scotland (5 Anne, cc. 5 & 8): and if at any time after becoming such regent he

against her: but, in the instance of conjugal infidelity, he is not subjected to the same penal restrictions. For which the reason seems to be, that if a queen consort is unfaithful to the royal bed, this may debase or bastardize the heirs to the Crown; but no such danger can be consequent on the infidelity of the husband to a queen regnant.

Queen Dowager.

A queen *dowager* is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death, or to violate her chastity, for the same reason as was before alleged, because the succession to the Crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special licence from the sovereign, on pain of forfeiting his lands and goods. This, Sir Edward Coke tells us, was enacted in Parliament in 6 Hen. VI., though the statute be not in print.[c] But she, though an alien born, 'was always' entitled to dower after the king's demise, which no other alien[d] 'was, till the common law in this respect' was altered. A queen dowager, when married again to a subject, does not lose her regal dignity as peeresses dowager ('when commoners by birth') do their peerage, when they marry commoners. For Catherine, queen dowager of Henry V., though she married a [225 private gentleman, Owen ap Meredith ap Theodore, commonly called Owen Tudor, yet, by the name of Catherine, Queen of England, maintained an action against the Bishop of Carlisle. And so, the Queen Dowager of Navarre marrying with Edmund, Earl of Lancaster, brother to King Edward the First, maintained an action of dower (after the death of her second husband) by the name of Queen of Navarre.[e]

Prince and Princess of Wales, and Princess Royal.

The Prince of Wales, or heir apparent to the Crown, and also his royal consort, and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws. For, by statute 25 Edw. III., to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason as to conspire the death of

profess the popish religion, or marry a person professing the Roman Catholic religion, or cease to reside in, or absent himself from the kingdom, his Royal Highness shall no longer be regent, and all his powers and authorities as regent shall thenceforth cease and determine.'

[c] 2 Inst. 18. See Riley's Plac. Parl. 672.

[d] Co.Litt.31 b.; 7 & 8 Vict. c. 66, s.16.

[e] 2 Inst. 50.

the king, or violate the chastity of the queen. And this upon the same reason as was before given; because the Prince of Wales is next in succession to the Crown, and to violate his wife might taint the blood royal with bastardy; and the eldest daughter of the king is also alone inheritable to the Crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters; insomuch that upon this, united with other (feudal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only. The heir apparent[f] to the Crown is usually made Prince of Wales and Earl of Chester, by special creation and investiture; but being the king's eldest son, he is by inheritance Duke of Cornwall, without any new creation.[g]

Younger sons and daughters.

The rest of the royal family may be considered in two different lights, according to the different senses in which the term, *royal family*, is used. The larger sense includes all those, who are by any possibility inheritable to the Crown. Such, before the Revolution, were all the descendants of William the Conqueror; who had branched into an amazing extent, by intermarriages with the ancient nobility. Since the Revolution and Act of Settlement, it means the Protestant issue of the Princess Sophia; now comparatively few in number, but which in process of time may possibly be as largely
[226] diffused. The more confined sense includes only those who are in a certain degree of propinquity to the reigning prince, and to whom, therefore, the law pays an extraordinary regard and respect: but, after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any farther, unless called to the succession upon failure of the nearer lines. For, though collateral consanguinity is regarded indefinitely, with respect to inheritance or succession, yet it is, and can only be regarded, within some certain limits in any

[f] The first Prince of Wales was Edward, second son of Edward I. The eldest son Alphonso, dying without issue, the Prince of Wales became heir apparent, and thenceforth the title has never been conferred on any but the eldest sons and eldest daughters of the monarch. Mary and Elizabeth were each created Princesses of Wales by Hen. VIII., each being at the time (the latter after the illegitimation of Mary) heiress presumptive.

[g] 8 Rep. 1; Seld. Tit. of Hon. 2, 5; Collier's Proceedings on Baronies, p. 148; *Lomax* v. *Holmden*, 1 Ves. 294; 5 & 6 Vic. c. 2.

other respect, by the natural constitution of things and the dictates of positive law.[h]

The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were therefore little farther regarded by the ancient law, than to give them, to a certain degree, precedence before all peers and public officers, as well ecclesiastical as temporal. This is done by the statute 31 Hen. VIII. c. 10, which enacts, that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the Parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which Sir Edward Coke[i] explains to signify grandson or *nepos*), or brother's or sister's son. Therefore, after these degrees are past, peers or others of the *blood royal* are entitled to no place or precedence, except what belongs to them by their personal rank or dignity. Which made Sir Edward Walker complain,[j] that by the hasty creation of Prince Rupert to be Duke of Cumberland, and of the Earl of Lennox to be duke of that name, previous to the creation of King Charles's second son James, to be Duke of York, it might happen that their grandsons would have precedence of the grandsons of the Duke of York.

Grandsons

Indeed, under the description of the king's *children* his *grandsons* are held to be included, without having recourse to Sir Edward Coke's interpretation of *nephew:* and therefore, when King George II. created his grandson Edward, the second son of Frederick, Prince of Wales, then deceased, Duke of York, and referred it to the House of Lords to settle his place and precedence, they certified[k] that he ought to have place next to the Duke of Cumberland, the then king's youngest son; and that he might have a seat on the left hand of the cloth of estate. But when, on the accession of King George III., those royal personages ceased to take place as the *children*, and ranked only as the *brother* and *uncle* of the king, they also left their seats on the side of the cloth of estate: so that when the Duke of Gloucester,[l] the

[h] See Essay on Collateral Consanguinity, in Law Tracts, 4to. Oxon. 1771.

[i] 4 Inst. 362.

[j] Tracts, p. 301.

[k] Lords' Journ. 24 Apr. 1760.

[l] Lords' Journ. 10 Jan. 1765.

king's second brother, took his seat in the House of Peers, he was placed at the upper end of the earls' bench (on which the dukes usually sit) next to his Royal Highness the Duke of York. In 1718, upon a question referred to all the judges by King George I., it was resolved by the opinion of ten against the other two,[m] that the education and care of all the king's grandchildren while minors, did belong of right to his Majesty as king of this realm, even during their father's life.[n] But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather, and the judges have more recently concurred in opinion,[o] that this care and approbation extend also to the presumptive heir of the Crown; though to what other branches of the royal family the same did extend, they did not find precisely determined. The most frequent instances of the Crown's interposition go no farther than nephews and nieces;[p] but examples are not wanting of its reaching to more distant collaterals.[q] And the statute 6 Henry VI., before mentioned, which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it;[r] "because the disparagement of the queen shall give greater comfort and example to other ladies of estate, who are of the *blood royal*, more lightly to disparage themselves."[s] Therefore, by the statute 28 Hen. VIII. c. 18 (repealed, among other statutes of treasons, by 1 Edw. VI. c. 12), it was made high treason for any

[m] The authorities and arguments of the two dissentient judges (Price and Eyre) are so full and cogent, that, if this question had arisen before the judges were independent of the crown, one would have been inclined to have suspected the sincerity of the other ten, and the authority of the decision. (See Harg. St. Tr. xi. 295.)—[CHRISTIAN.]

[n] Fortesc. Al. 401-440.

[o] Lords' Journ. 28 Feb. 1772.

[p] (See (besides the instances cited in Fortescue Aland) for *brothers* and *sisters*; under King Edward III., 4 Rym. 392, 403, 411, 501, 508, 512, 549, 683:—under Hen. V., 9 Rym. 710, 711, 741:—under Edw. IV., 11 Rym. 564, 565, 590, 601:—under Hen. VIII., 13 Rym. 249, 423:—under Edw. VI., 7 St. Tr. 3, 8:—For *nephews* and *nieces*; under Hen. III., 1 Rym. 852:—under Edw. I., 2 Rym. 489:—under Edw. III., 5 Rym. 561:—under Rich. II., 7 Rym. 264:—under Rich. III., 12 Rym. 232, 244:—under Hen. VIII., 15 Rym. 26, 31.

[q] To *great-nieces*; under Edw. II., 3 Rym. 575, 644. To *first cousins*; under Edw. III., 5 Rym. 177. To *second* and *third cousins*; under Edw. III., 5 Rym. 729:—under Rich. II., 7 Rym. 225:—under Hen. VI., 10 Rym. 322:—under Hen. VII., 12 Rym. 529:—under Queen Elizabeth, Camb. Ann. A.D. 1562. To *fourth cousins*: under Hen. VII., 12 Rym. 329. To the *blood royal* in general; under Rich. II., 7 Rym. 787.

[r] The occasion of this statute was the marriage of Catherine, mother of Henry VI., with Owen Tudor.—[CHRISTIAN.]

[s] Ril. Plac. Parl. 672.

man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paternâ*, or the children of his brethren or sisters; being exactly the same degrees, to which precedence is allowed by the statute 31 Hen. VIII., before mentioned. And now, by statute 12 Geo. III. c. 11,[t] no descendant of the body of King George II. (other than the issue of princesses married into foreign families) is capable of contracting matrimony, without the previous consent of the sovereign signified under the great seal; and any marriage contracted without such consent is void. Provided, that such of the said descendants, as are above the age of twenty-five, may after a twelvemonth's notice, given to the privy council, contract and solemnize marriage without the consent of the Crown; unless both Houses of Parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present at any such prohibited marriage, shall incur the penalties of the statute of *præmunire*. 'Accordingly, on the death of the late Duke of Sussex, the fifth son of King George III., who had been married at Rome in 1792, by a minister of the Church of England, and shortly afterwards again in England, according to the rules of the Church of England, it was held that his peerage did not pass to the only son of the marriage, Sir Augustus D'Este; but that the statute extended to prohibit contracts for, and to annul any marriages contracted in violation of its provisions, wherever the same might be contracted or solemnized.'[u]

[t] Passed in consequence of the marriages of the king's brothers, the Dukes of Gloucester and Cumberland; the former to the Dowager Countess of Waldegrave; the latter to Mrs. Horton daughter of Lord Irnham.

[u] The *Sussex Peerage* case, 11 Cl. & Fin. 85.

CHAPTER V.

OF THE ROYAL COUNCILS.

[227] THE third point of view, in which we are to consider the sovereign, is with regard to his councils. For, in order to assist him in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law has assigned him a diversity of councils to advise with.

1. The Parliament

1. The first of these is the high court of Parliament, whereof we have already treated at large.

2. The Peers of the Realm.

2. Secondly, the Peers of the Realm are by their birth hereditary counsellors of the Crown, and may be called together by the Crown to impart their advice in all matters of importance to the realm, either in time of parliament, or, which has been their principal use, when there is no parliament in being.[a] Accordingly Bracton,[b] speaking of the nobility of his time, says they might probably be called "*consules, a consulendo; reges enim tales sibi associant ad consulendum.*" And in our law books,[c] it is laid down, that peers are created for two reasons: 1. *Ad consulendum;* 2. *Ad defendendum, regem:* on which account the law gives them certain great and high privileges; such as freedom from arrest, &c., even when no parliament is sitting; because it intends that they are always assisting the sovereign with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valour.

[228] Instances of conventions of the peers, to advise the Crown, have been in former times very frequent, though now fallen into disuse by reason of the more regular meetings of parliament. Sir Edward Coke[d] gives us an extract of a record, 5 Hen. IV., concerning an exchange of lands between the

[a] Co. Litt. 110.
[b] L. 1, c. 8.
[c] 7 Rep. 34; 9 Rep. 49; 12 Rep. 96.
[d] 1 Inst. 110.

king and the Earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament (if any should be called before the feast of Saint Lucia), or otherwise by advice of the grand council of peers which the king promises to assemble before the said feast, in case no parliament shall be called. Many other instances of this kind of meeting are to be found under our ancient kings; though the formal method of convoking them had been so long left off, that when King Charles I. in 1640, issued out writs under the great seal to call a great council of all the peers of England to meet and attend his majesty at York, previous to the meeting of the long parliament, the Earl of Clarendon[c] mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together; as was particularly the case with King James the Second, after the landing of the Prince of Orange; and with the Prince of Orange himself, before he called that convention parliament, which afterwards called him to the throne.

Besides this general meeting, it is usually looked upon to be the right of each particular peer of the realm to demand an audience of the sovereign, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And therefore, in the reign of Edward II., it was made an article of impeachment in parliament against the two Hugh Spencers, father and son, for which they were banished the kingdom, "that they by their evil covin would [229]
"not suffer the great men of the realm, the king's good counsellors, to speak with the king, or to come near him; but only in the presence and hearing of the said Hugh the father and Hugh the son, or one of them, and at their will, and according to such things as pleased them."[f]

[c] Hist. b. 2.

[f] 4 Inst. 53. 'Sir William Blackstone here mentions as' a third council belong to the sovereign, his judges of the courts of law, for law matters (1 Inst. 110). And this, 'he says,' appears frequently in our statutes, particularly 14 Edw. III. c. 5, and in other

3 The privy council.

3. But the principal council belonging to the sovereign is the privy council, which is generally called by way of eminence, *The Council.* And this, according to Sir Edward Coke's description of it,[g] is a noble, honourable, and reverend assembly of the sovereign and such as he wills to be of his privy council, in his court or palace. The sovereign's will is the sole constituent of a privy counsellor, and this also regulates their number, which of ancient time was twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and despatch, and therefore King Charles the Second in 1679 limited it to thirty; whereof

[230] Their number.

fifteen were to be the principal officers of state, and those to be counsellors *virtute officii;* and the other fifteen were composed of ten lords and five commoners of the sovereign's choosing. But since that time the number has been much augmented, and now continues indefinite.[h]

'It is somewhat difficult to trace the origin, and more diffi-

books of law. So that when the king's council is mentioned generally, it must be defined, particularized, and understood, *secundum subjectam materiam;* and if the subject be of a legal nature, then by the king's council is understood his council for matters of law, namely, his judges. Therefore, 'adds Blackstone,' when by statute 16 Ric. II. c. 5, it was made a high offence to import into this kingdom any papal bulls, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the king and his *council* to answer for such offence: here, by the expression of the king's *council*, were understood the king's judges of his courts of justice, the subject matter being legal: this being the general way of interpreting the word *council* (3 Inst. 125). 'But this interpretation has been questioned by Mr. Justice Coleridge (Coleridge's Blackst. vol. i. p. 229), who is of opinion that the "council" here mentioned was a court of very extensive equitable jurisdiction, both in civil and criminal matters, the fountain from which, in process of time, the Courts of Chancery and Star Chamber were derived—an opinion the correctness of which subsequent researches have fully justified. (Reports of the Committee on the Privileges of the Peerage, *passim;* Sir Harris Nicolas' "Proceedings and Ordinances of the Privy Council of England," printed under the direction of the Commissioners of the Public Records; Hallam's Const. Hist. vol. i. ch. 1.)'

[g] 4 Inst. 53.

[h] 'Only a few of those privy councillors who are for the time honoured with the confidence of the Sovereign attend the meetings of the Privy Council, as it is generally understood that no privy councillor shall attend unless specially summoned. These constitute the "cabinet;" they are selected from among the ministers of the Crown, and are hence termed the "ministry," or "administration," or the "government." Each member of the cabinet is usually invested with some of the higher offices of state; but they have no appointment as members of the "cabinet," which has no recognised legal existence. Each officer who conducts the exercise of the royal authority, or prerogative, in his own department, is responsible for those measures only to which he has individually assented. (Hallam's Const. Hist. vol. iii. ch. 15.)'

cult to define the early jurisdiction, of the *privy* or *secret* council of the sovereign. It can be readily understood, however, that his inclinations and necessities would lead him to call to his aid those with whom by choice or circumstance he was placed in immediate contact, and with whom he could take counsel at other times and for other purposes than when the great councils of the realm were assembled. And as in the early period of our history, those great councils, whether under the title of the Saxon *Witenagemote*, or the Norman *Curia Regis*, possessed judicial as well as legislative and administrative functions; so the privy council exercised similar powers, the proceedings of both bodies being the acts, ordinances, or decrees of the sovereign, with the advice of his "Great Council," or "Continual Council," as the case might be.'[i]

'On the other hand it has been supposed, that, the supreme judicature, which had been exercised by the king's court (the *Curia Regis*) having been diverted about the reign of John into the tribunals of the King's Bench, the Common Pleas, and the Exchequer, the original institution in matters relating to state policy and revenue, preserved its jurisdiction under the style of the king's continual or privy council.'[j]

"The writers on the constitution, 'however,' have not been "able either to define the limits of the authority of the 'con- "tinual or privy' council, or to bring the duties which it per- "formed within any general principle. Until the royal "prerogative became restrained by the gradual increase of

[i] The king's permanent, or what would now be termed the privy council, was called in the records of parliament his "Continual or Permanent Council," in contradistinction to "the Great Councils," which met only in consequence of special writs of summons; whereas the "Continual Council" sat daily for the despatch of business. Little is known of the exact nature of the "Great Councils:" they appear to have been summoned whenever affairs of greater moment occurred than the "Continual Council" thought proper to determine, but which were not of such a nature or such a degree of importance, as to render it advisable to bring them before parliament. The "Great Council" consisted of all the members of the "Continual Council," and of the spiritual and temporal peers, as well as of those individuals who, from their abilities or local or professional information, were most competent to advise on the matters in debate. Thus a "Great Council" in the second year of Richard the Second, 1379, is said to have contained nearly all the prelates, as well "abbots as others, dukes, earls, barons, banerets, et autres sages" of the realm. Sir Harris Nicolas' Preface to the "Proceedings and Ordinances of the Privy Council of England.")

[j] Hallam's Middle Ages, chap. viii. part iii.

" power on the part of the two other estates of the realm, and " the jurisdiction of the courts of law and equity was clearly " marked out, there was scarcely a department of the state " which was not, in a greater or less degree, subject to its im- " mediate control. No rank was too exalted or too humble to " be exempt from its vigilance; nor was any matter considered " too insignificant for its interference. Its decision was the " ultimate remedy for every grievance for which the common " law courts could not provide; and its proceedings exhibit " an extraordinary combination of the executive and legisla- " tive functions of the government. As might be expected " from its great and irresponsible power, the commons watched " its proceedings with considerable jealousy; and on several " occasions, from the reign of Edward the Third to that of " Henry the Sixth, they made vigorous efforts to prevent the " council from interfering with matters which belonged to the " courts of law, and from illegally infringing upon the pro- " perty and liberties of the people."[k]

'Thus the statute 25 Edw. III. stat. 5, c. 4, (repealed three years afterwards,) enacts that " none shall be taken by petition " or suggestion to the king or his council, unless it be by in- " dictment or presentment, or by writ original at the common " law, nor shall be put out of his franchise or freehold unless " he be duly put to answer, and forejudged of the same by " due course of law." So in the thirteenth year of the reign of Richard the Second, the commons petitioned that " neither " the chancellor *nor the king's council*, after the close of par- " liament, may make any ordinance against the common law " or the ancient customs of the land, or the statutes made " heretofore or to be made in this parliament; but that the " common law have its course for all the people, and no " judgment be rendered without due legal process."[l]

'After the accession of the Lancastrian family, these griev- ances here protested against became rather less frequent; but the commons remonstrated several times, even in the minority of Henry VI., against the council's interference in matters cognizable at common law.'[m]

[k] Sir Harris Nicolas' preface to " Proceedings, &c., of the Privy Coun- cil."

[l] Rol. Parl. vol. iii. p. 266, and Hal- lam's Middle Ages, chap. viii. part iii.

[m] Hallam, Mid. Ages, chap. viii. part iii. and authorities there cited.

'The powers of which the exercise was thus protested against, related, it will be observed, rather to private affairs than to matters of state; and in the sixteenth century a clear distinction existed in the constitution of the council, which took upon itself the exercise of those functions, and the deliberative body, the advisers of the Crown, constituting the privy council in the strict sense of the word. The former was the *concilium ordinarium*, composed, in addition to the privy councillors, of the chief justices, and perhaps other temporal and spiritual peers, which was placed on a distinct footing from the privy council by the statute 3 Hen. VII. c. 1, and is more familiar to us by the name of the Court of Star Chamber.'

'In the arbitrary reign of Henry the Eighth, the encroachments of the privy council, strictly so called, in matters of state, were expressly sanctioned by the legislature. By the statute 31 Hen. VIII. c. 8, the king, with the advice of his privy council, was empowered to set forth proclamations under such pains and penalties as seemed to them necessary, which were to be observed as though they were made by Act of Parliament. This statute was repealed in the first year of the reign of Edward the Sixth, and the attempts to enlarge the jurisdiction of the council in private matters were finally put an end to by the statute 16 Car. I. c. 10, which at the same time abolished the Court of the Star Chamber. The statute recites that of late years "the council-table hath assumed unto "itself a power to intermeddle in civil causes, and matters "only of private interest between party and party, and have "adventured to determine of the estates and liberties of the "subject, contrary to the laws of the land and the rights and "privileges of the subject:" and then proceeds to declare, that neither the king nor his privy council have or ought to have any jurisdiction in such matters, but that they ought to be tried and determined in the ordinary courts of justice, and by the ordinary courts of law.'

'In this way the functions of the privy council, although never defined, have become gradually restricted to the constitutional limits within which they are now exercised.'

'The privy council is presided over by the lord president of the council,' an officer, that by the statute of 31 Hen. VIII.

c. 10, has precedence next after the lord chancellor and lord treasurer.[n]

How made.

Privy counsellors are *made* by the sovereign's nomination, without either patent or grant; and, on taking the necessary oaths, they become immediately privy counsellors during the life of the sovereign that chooses them, but subject to removal at his discretion.[o]

Their qualification.

As to the *qualifications* of members to sit at this board; any natural-born subject of England is capable of being a member of the privy council; on taking the proper oaths for security of the government, and the 'declaration'[p] for security of the church. But, in order to prevent any persons under foreign attachments from insinuating themselves into this important trust, as happened in the reign of King William in many in-

[n] 'Although the members of the "Continual Council" were sworn to secrecy, the term "Privy" or "Secret Council" is of rare occurrence; nor is the title of "President of the Council" to be found until a recent period. That office, however, existed; but it is not certain whether it was always borne by one of the members of the "Continual Council," or was created in favour of particular individuals. William of Wykeham, bishop of Winchester, is said, in a patent of the first year of Richard the Second, 1377, to have held the offices of clerk of the privy seal, "et capitalis secreti consilii ac gubernatoris magni consilii," in the reign of Edward the Third. The Duke of Bedford was appointed principal councillor of the king, or "chief of the king's council," in the first year of Henry the Sixth; and in his absence the Duke of Gloucester was to hold that situation, with the casting vote in council in cases of equality of opinion. The same designation was granted to the Duke of York, when, in consequence of the incapacity of Henry the Sixth, he was made protector of the realm in 1454; and the same title was to be borne by the Prince of Wales when he arrived at years of discretion.' (Sir Harris Nicolas' Preface to "Proceedings, &c., of Privy Council.")

[o] 'Privy Counsellors, who have now only an honorary precedence, formerly possessed certain other privileges. These consisted principally in the security which the law gave them against attempts and conspiracies to destroy their lives; for (by statute 3 Hen. VII. c. 14) if any of the king's servants, of his household, conspired or imagined to take away the life of a privy counsellor, it was felony, though nothing were done upon it. The reason of making this statute, Sir Edward Coke (3 Inst. 38) tells us, was because such a conspiracy was, just before this parliament, made by some of King Henry the Seventh's household servants, and great mischief was like to have ensued thereupon. This extended only to the king's menial servants. The statute 9 Ann. c.16, went further, and enacted that *any person* that should unlawfully attempt to kill, or unlawfully assault, strike, or wound, any privy counsellor in the execution of his office, should be a felon without benefit of clergy. This statute was made upon the daring attempt of the Sieur Guiscard, who stabbed Mr. Harley, afterwards Earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council (Bl. Com. vol. i. p. 232). 'The statutes of Henry VII. and of Queen Anne are both repealed.' (9 Geo. IV. c. 31.)

[p] The declaration substituted for the sacramental *test*, abolished by statute 9 Geo. IV. c. 17.

stances,[q] it is enacted by the Act of Settlement, that no person born out of the dominions of the Crown of England, unless born of English parents, even though naturalized by parliament,[r] shall be capable of being of the privy council.[s]

The *duty* of a privy counsellor appears from the oath of office, which consists of seven articles: 1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, meed, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general, 7. To observe, keep, and do all that a good and true counsellor ought to do to his sovereign lord. Their duty. [231]

'In accordance with these duties of a privy councillor, it follows, that when summoned to attend the sovereign in council, the office consists in advising him in the conduct of the affairs of state; and as in practice, those privy councillors only are summoned who hold for the time being the reins of government, or, in other words, the ministers of the Crown, the most important proceedings in council consist in laying before and advising the sovereign on those measures which the councillors have previously discussed and determined upon in their own cabinet councils; and for which, although sanctioned, adopted, and often subsequently carried out in the name of the sovereign, they alone are accountable to parliament.'

'Besides the more important matters of state which are determined at privy councils, there are various acts of a more formal character, which either by virtue of long-established custom, or of special legislative provision, are done in the privy council, and are then said to be done by the sovereign with the advice of the privy council. Of the former class may be cited as instances the annual selection of sheriffs for

[q] Macaulay's Hist. of England, vols. iii. & iv. *passim*.

[r] 'This applies only to ordinary acts of naturalization (see vol. ii. p. 241.) The present King of the Belgians, previous to his marriage with the Princess Charlotte, and his Royal Highness Prince Albert, before he was married to her present Majesty, were enabled to be sworn of the privy council. (See 56 Geo. III. cc. 12, 13, and 3 & 4 Vict. c. 2.'

[s] Hallam, Const. Hist. vol. iii. ch. 15.

England and Wales, and the issuing of proclamations for various purposes. The extension to a particular district of the provisions of the Public Health Act, 1848, or to the local courts of justice, of the enactments of the recent statutes amending legal procedure, are effected by an order in council.'

'In colonial matters, again, the authority of the sovereign in council is more or less extensive. In the Channel Islands, it is said to be absolute, although in modern times much of the legislation for these islands has been by Act of Parliament.[t] Laws and ordinances are made in the privy council for those colonies and settlements which do not possess representative assemblies, and the legislative Acts of most of the other dependencies of the Crown are therein approved or disallowed.' Whenever also a question arises between two provinces, as concerning the extent of their charters and the like, the sovereign in council exercises *original* jurisdiction therein, upon the principle of feudal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feudal principality, by grant from the sovereign or his ancestors, the determination of that right belongs to his majesty in council: as was the case of the Earl of Derby with regard to the Isle of Man in the reign of Queen Elizabeth, and the Earl of Cardigan and others, as representatives of the Duke of Montague, with relation to the island of St. Vincent in 1764.

'Such are the ordinary functions of the privy council; but nearly every important act done by the sovereign in person, from the first assumption of the regal dignity, is likewise performed in council; as, for instance, all declarations of, or public engagements by, the sovereign, or consents to marriages by members of the royal family.'

In plantation or admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy or idiocy,[u] being a special flower of the prerogative; the appeal 'formerly' lay to the sovereign in council; and from all the
[232] dominions of the Crown, excepting Great Britain and Ireland, an *appellate* jurisdiction (in the last resort) was formerly vested

[t] See, for instance, the Customs' Consolidation Act, 1855, § 359.
[u] 3 P. Wms. 108.

in the same tribunal; which usually exercised this judicial authority in a committee of the whole privy council, who heard the allegations and proofs, and made their report to the sovereign in council, by whom the judgment was finally given.

'Appeals to the sovereign in ecclesiastical causes, as head of the church, and in maritime causes from the courts of admiralty in this country, were formerly heard by certain commissioners appointed for that purpose under the great seal, who constituted what was termed the High Court of Delegates. The jurisdiction of this court was, on its abolition, transferred to the sovereign in council, by the statute 2 & 3 Will. IV. c. 92.'

'All the powers and authority of the queen in council, of a judicial character, are now however delegated to the *judicial committee of the privy council.* This court was created by the statute 3 & 4 Will. IV. c. 41,[v] and consists of the Lord President of the Council, the Lord Chancellor, and such members of the privy council as from time to time hold any of the following offices; viz., the Lord Keeper or First Lord Commissioner of the Great Seal, the Lord Chief Justice of the Queen's Bench, the Judges of the Court of Appeal in Chancery, the Master of the Rolls, the Vice-Chancellors, the Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the Judges of the Prerogative and Admiralty Courts, and the Chief Judge of the Bankruptcy Court, with all members of the privy council who have been presidents or chancellors, or who have held any of the above offices, and any two other persons, being privy councillors, whom the queen may think fit to appoint, and two retired East Indian or Colonial judges being also members of the privy council. In appeals against any judgment pronounced by a bishop, in the case of a clerk in holy orders for an offence against the ecclesiastical laws, every archbishop and bishop, who is a privy councillor, is constituted a member of this judicial committee.' Judicial committee.

'The jurisdiction of the judicial committee, is, by the statute creating it, to hear and determine all appeals on applications in prize suits, and in all other suits or proceedings in the courts of admiralty or vice-admiralty, or in any other court in the plantations in America, or other Her Majesty's dominions

[v] Amended and extended by statutes 5 Vict. c. 5, and 14 & 15 Vict. c. 83.

abroad; and all appeals, or complaints in the nature of appeals, which may be brought before the queen in council against the sentence or order of any judge or judicial officer; and all other matters which Her Majesty may refer for their decision. The jurisdiction and powers of this court in appeals from the colonies and from the Suddar courts in India, have been extended and enlarged by subsequent statutes.' [w]

'The judicial committee of the privy council also decides on applications for the confirmation and extension of patents, and for the republication of books, which, after the death of the author, the proprietor under the Copyright Acts has refused to publish.' [x]

'Three members of the committee, exclusive of the lord president, constitute the minimum number before whom appeals can be heard. Various provisions have been made, regulating the mode of conducting the appeals according to the subject matter; for the enforcing of orders and judgments, and for punishing contempts.' [y]

Committee for education

'In 1839 a committee of the privy council for education was appointed to distribute the sums annually voted by parliament, for the erection of schoolhouses, and especially for the formation and encouragement of normal schools. The committee consists of the lord president and four other privy councillors, under whom are a secretary and twenty-three inspectors.' [z]

'Besides the above, other committees or boards have been appointed for performing certain administrative functions of the government, which otherwise would devolve on the sovereign in council. Such are the Board of Trade, the Board of Health, and the Poor Law Board; but although the principal members of these Boards are privy councillors, their proceedings are so severed from and independent of the privy council, that any further reference to them would be out of place here, where we are considering the privy council in immediate connexion with the sovereign.'

[w] 5 & 6 Will. IV. c 83; 3 & 4 Vict. c. 65; 7 & 8 Vict c 69; 8 & 9 Vict c. 30; 2 & 3 Vict c. 67; 7 & 8 Vict. c. 69; 15 & 16 Vict. c. 83; 16 & 17 Vict. c. 115.

[x] 5 & 6 Vict. c. 45; see vol. ii. ch. 25.

[y] 3 & 4 Will. IV. c. 41; 3 & 4 Vict c. 65; 6 & 7 Vict. c. 38; 7 & 8 Vict c. 69.

[z] A vice-president may also be appointed at any time (19 & 20 Vict c 116).

'It will be observed that the powers and duties of privy councillors hitherto spoken of, consist in advising the sovereign as to matters which are done in his name, or in the performance of functions principally of a judicial nature delegated to them by him. The privy council or the lords of the council have, however, power, sitting without the presence of the sovereign,' to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction herein is only to inquire, and not to punish: and the persons committed by them are entitled to their *habeas corpus* by statute 16 Car. I, c. 10, as much as if committed by an ordinary justice of the peace. It was by the same statute, that the Court of Star Chamber, and the Court of Requests, both of which consisted of privy councillors, were dissolved; and it was declared illegal for them to take cognizance of any matter of property belonging to the subjects of this kingdom.

'On the death of the king or queen regnant, the privy council, moreover, assembles and orders the proclamation of the successor, and so again, on any great state emergency, it institutes inquiries and determines the course of proceeding, and the position and claims of persons; of which the investigation as to the birth of the male heir of James the Second, the inquiry as to the insanity of George the Third, and the claim of Queen Caroline to be crowned as the queen consort of George the Fourth, may be cited as illustrations.'

The dissolution of the privy council depends upon the royal pleasure; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law also it was dissolved *ipso facto* by the demise of the sovereign, as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted by statute 6 Ann. c. 7, that the privy council shall continue for six months after the demise of the Crown, unless sooner determined by the successor. The dissolution.

CHAPTER VI.

OF THE SOVEREIGN'S DUTIES.

[233] I PROCEED next to the duties incumbent on the sovereign by our constitution; in consideration of which duties his dignity and prerogative are established by the laws of the land: it being a maxim in the law, that protection and subjection are reciprocal.[a] And these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared King James had broken the *original* contract between king and people. But however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law (in which deduction different understandings might very considerably differ) it was, after the Revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince who has reigned since the year 1688.

To govern according to law.

The principal duty of the sovereign is to govern his people according to law. *Nec regibus infinita aut libera potestas,* was the constitution of our German ancestors on the Continent.[b] And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when [234] prerogative was at the highest. "The king," says Bracton,[c] who wrote under Henry III., "ought not to be subject to man, "but to God, and to the law; for the law maketh the king. "Let the king therefore render to the law, what the law has "invested in him with regard to others; dominion and power: "for he is not truly king, where will and pleasure rules, and

[a] 7 Rep. 5. [b] Tac. de Mor. Germ. c. 7. [c] L. 1, c. 8.

"not the law." And again,[d] "the king also hath a superior, namely God, and also the law, by which he was made a king." Thus Bracton: and Fortescue also,[e] having first well distinguished between a monarchy absolutely and despotically regal, which is introduced by conquest and violence, and a political or civil monarchy, which arises from mutual consent (of which last species he asserts the government of England to be), immediately lays it down as a principle, that "the king of England must rule his people according to the decrees of the laws thereof: insomuch that he is bound by an oath at his coronation to the observance and keeping of his own laws." But, to obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 & 13 Will. III. c. 2, "that the laws of England are the birthright of the people thereof; and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws: and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are ratified and confirmed accordingly."

The Coronation Oath.

And, as to the terms of the original contract between king and people, these I apprehend to be now couched in the coronation oath, which by the statute 1 W. & M. st. 1, c. 6, is to be administered to every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the Crown. This coronation oath is conceived in the following terms:—

"*The archbishop or bishop shall say.* Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same?—*The king or queen shall say,* I solemnly promise so to do.——*Archbishop or bishop.* Will you to your power cause law and justice, in mercy, to be executed in all your [235]

[d] L. 2, c. 16, § 3.

[e] C. 9 & 34.

judgments?—*King or queen.* I will.——*Archbishop or bishop.* Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the protestant reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?—*King or queen.*—All this I promise to do.——*After this the king or queen, laying his or her hand upon the Holy Gospels, shall say,* The things which I have here before promised I will perform and keep: So help me God: *and then shall kiss the book.*"

This is the form of the coronation oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as ancient as the Mirror of Justices,[f] and even as the time of Bracton:[g] but the wording of it was changed at the Revolution, because (as the statute alleges) the oath itself had been framed in doubtful words and expressions, with relation to ancient laws and constitutions at this time un-
[236] known.[h] However, in what form soever it be conceived, this is most indisputably a fundamental and original express contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after: in the same manner as allegiance to the sovereign becomes the duty of the subject immediately on the descent of the Crown, before he has taken the oath of allegiance, or whether he ever takes it at all. This reciprocal duty of the subject will be

[f] Cap. 1, § 2.

[g] L. 3, tr. 1, c. 9.

[h] In the old folio abridgment of the statutes, printed by Lettou and Machlinia in the reign of Edward IV. (*penes me*) there is preserved a copy of the old coronation oath; whic , as the book is extremely scarce, I will here transcribe. *Ceo est le serement que le roy jurre a soun coronement: que il gardera et meintenera lez droitez et lez franchisez de seynt eglise grauntez auncienment dez droitz roys christiens d'Engletere, et quil gardera toutez sez terrez, honoures et dignites droiturelx et franks del coron du roialme d'Engletere en tout maner dentierte sanz null maner damenusement, et lez droitez dispergez dilapidez ou perduz de la corone a soun poiair reappeller en launcien estate, et quil gardera le peas de seynt eglise et al clergie et al people de bon accorde, et quil face faire en toutez sez jugementez owel et droit justice oue discretion et misericorde, et quil grauntera e tenure lez leyes et custumez du roialme, et a soun poiar lez face garder et affirmer que lez gentez du people avont faitez et esliez, et les malveys leyz et custumes de tout oustera, et ferme peas et establie al people de soun roialme en ceo garde esgardera a soun poiair; come Dieu luy aide.* (*Tit. sacramentum regis, fol. m. ij.*) Prynne has also given us a copy of the coronation oaths of Richard II. (Signal Loyalty, ii. 246); Edward VI. (ibid. 251); James I. and Charles I. (ibid. 269) [Bl. Com. v. i. p. 236. n.]

considered in its proper place. At present we are only to observe, that in the sovereign's part of this original contract are expressed all the duties that a monarch can owe to his people: viz. to govern according to law; to execute judgment in mercy; and to maintain the established religion. And, with respect to the latter of these three branches, we may farther remark, that by the Act of Union 'with Scotland,' 5 Ann. c. 8, two preceding statutes are recited and confirmed; the one of the Parliament of Scotland, the other of the Parliament of England: which enact; the former, that every king at his accession shall take and subscribe an oath, to preserve the Protestant religion and Presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the Church of England within England, Ireland, Wales, and Berwick, and the territories thereunto belonging.

CHAPTER VII.

OF THE ROYAL PREROGATIVE.

[237] It was observed in a former chapter, that one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the sovereign's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which, in all states impliedly, and in ours most expressly, subsists between the prince and the subject. It will now be our business to consider this prerogative minutely; to demonstrate its necessity in general; and to mark out in the most important instances its particular extent and restrictions: from which considerations this conclusion will evidently follow, that the powers, which are vested in the Crown by the laws of England, are necessary for the support of society; and do not intrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil.*

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining, with decency and respect, the limits of the royal prerogative: a topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the *arcana imperii*: and,
[238] like the mysteries of the *Bona Dea*, was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry. The glorious Queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state; and it was the constant language of this favourite princess and her ministers, that even that august assembly "ought not to deal, to judge, or to meddle with her

majesty's prerogative royal."[a] And her successor, King James the First, who had imbibed high notions of the divinity of regal sway, more than once laid it down in his speeches, that "as it "is atheism and blasphemy in a creature to dispute what the "deity may do, so it is presumption and sedition in a subject "to dispute what a king may do in the height of his power: "good Christians (he adds) will be content with God's will, "revealed in his word; and good subjects will rest in the "king's will, revealed in *his* law."[b]

Origin of the prerogative.

But, whatever might be the sentiments of some of our princes, this was never the language of our ancient constitution and laws. The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe; though gradually driven out and overborne, by violence and chicane, in most of the kingdoms on the Continent. We have seen, in the preceding chapter, the sentiments of Bracton and Fortescue, at the distance of two centuries from each other. And Sir Henry Finch, under Charles the First, after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatic terms, yet qualifies it with a general restriction, in regard to the liberties of the people. "The king hath a prerogative "in all things that are not injurious to the subject; for in "them all it must be remembered, that the king's prerogative "stretcheth not to the doing of any wrong."[c] *Nihil enim aliud* [239] *potest rex, nisi id solum quod de jure potest.*[d] And here it may be some satisfaction to remark, how widely the civil law differs from our own, with regard to the authority of the laws over the prince, or (as a civilian would rather have expressed it) the authority of the prince over the laws. It is a maxim of the English law, as we have seen from Bracton, that "*rex debet esse sub lege, quia lex facit regem:*" the imperial law will tell us, that, "*in omnibus imperatoris excipitur fortuna: cui ipsas leges Deus subjecit.*"[e] We shall not long hesitate to which of them to give the preference, as most conducive to those ends for which societies were framed, and are kept together; especially as the Roman lawyers themselves seem to be sensible of the unreasonableness of their own constitution. "*Decet tamen*

[a] D'Ewes, 479, 645.
[b] King James's works, 557, 531.
[c] Finch, L. 84, 85.
[d] Bracton, l. 3, tr. 1, c. 9.
[e] Nov. 105, § 2.

principem," says Paulus, "*servare leges, quibus ipse solutus est.*"[f] This is at once laying down the principle of despotic power, and at the same time acknowledging its absurdity.

By the word prerogative we usually understand that special pre-eminence, which the Crown has, over and above all other persons, and out of the ordinary course of the common law, in right of the regal dignity. It signifies, in its etymology (from *præ* and *rogo*) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the sovereign enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch[g] lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.

Prerogatives direct or incidental.

[240] Prerogatives are either *direct* or *incidental.* The *direct* are such positive substantial parts of the royal character and authority, as are rooted in and spring from the sovereign's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the person of the sovereign; and are indeed only exceptions, in favour of the Crown, to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the Crown;[h] that the sovereign can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects. These and an infinite number of other instances, will better be understood, when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions. And therefore we will at present only dwell upon the sovereign's substantive or direct prerogatives.

[f] Ff. 32, 1, 23.

[g] Finch, L. 85.

[h] 'By the stat. 16 & 17 Vict. c. 107, s. 263, the defendant in suits and proceedings by the Crown for duties, penalties, or forfeitures under the Customs' Acts, is entitled to costs if he succeeds, and pays them if he fails. Although former Acts *gave costs*, in particular cases, *to the Crown*, this is the first act which imposes payment of costs on the Crown in case of failure.'

Direct prerogatives.

These substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, the royal *character*; secondly, the royal *authority*; and, lastly, the royal *income*. These are necessary to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government, without all of which it is impossible to maintain the executive power in due independence and vigour. Yet in every branch of this large and extensive dominion, our free constitution has interposed such reasonable checks and restrictions, as may curb it from trampling on those liberties, which it was meant to secure and establish. The enormous weight of prerogative, if left to itself (as in arbitrary governments it is) spreads havoc and destruction among all the inferior movements; but, when balanced and regulated (as with us) by its proper counterpoise, timely and judiciously applied, its operations are then equable and certain, it invigorates the whole machine, and enables every part to answer the end of its construction.

In the present chapter we shall only consider the two first of these divisions, which relate to the sovereign's political [241] *character* and *authority*; or, in other words, his *dignity* and regal *power*; to which last the name of prerogative is frequently narrowed and confined. The other division, which forms the royal *revenue*, will require a distinct examination; according to the known distribution of the feudal writers, who distinguish the royal prerogatives into the *majora* and *minora regalia*, in the latter of which classes the rights of the revenue are ranked. For, to use their own words, "*majora regalia imperii præ-eminentiam spectant; minora vero ad commodum pecuniarium immediate attinent; et hæc proprie fiscalia sunt, et ad jus fisci pertinent.*"[i]

I. Of the royal dignity.

First, then, of the *royal dignity*. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man, appointed by mutual consent to preside over many

[i] Peregrin. de jure fisc. l. 1, c. 1, num. 9.

others, and will pay him that reverence and duty which the principles of society demand, yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law therefore ascribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain attributes of a great and transcendant nature, by which the people are led to consider him in the light of a superior being, and to pay him that respect which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine.

(1). Sovereignty, or pre-eminence.

1. And, first, the law ascribes to the king 'or queen regnant' the *attribute* of *sovereignty* or pre-eminence. "*Rex est vicarius,*" says Bracton,[j] "*et minister Dei in terrâ: omnis* [242] *quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo.*" He is said to have *imperial* dignity; and in charters before the Conquest is frequently styled *basileus* and *imperator*, the titles respectively assumed by the emperors of the east and west.[k] His realm is declared to be an *empire*, and his crown *imperial*, by many Acts of Parliament, particularly the statutes of 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 28;[l] which at the same time declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not (as the creation of notaries and the like), and that all kings were in some degree subordinate and subject to the Emperor of Germany or Rome. The meaning, therefore, of the legislature, when it uses these terms of *empire* and *imperial*, and applies them to the realm and Crown of England, is only to assert that our king is equally sovereign and independent within these his dominions, as any emperor is in his empire;[m] and owes no

[j] L. 1, c. 8.

[k] Seld. Tit. of Hon. i. 2.

[l] See also 24 Geo. II. c. 24; 5 Geo. III. c. 27.

[m] *Rex allegavit, quod ipse omnes libertates haberet in regno suo, quas imperator vindicabat in imperio.* (M. Paris, A.D. 1095.)

kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the sovereign, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible unless that court had power to command the execution of it: but who, says Finch,[n] shall command the king? Hence it is, likewise, that by the law the person of the sovereign is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more: and if such a power were vested in any domestic tribunal, [243] there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Remedies against the crown:

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the Crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

for private injuries, by petition;

And, first, as to *private injuries:* if any person has, in point of property, a just demand upon the Crown, he must petition him in the Court of Chancery, where his Chancellor will administer right as a matter of grace, though not upon compulsion.[o] And this is entirely consonant to what is laid down by the writers on natural law. "A subject," says Puffendorf,[p] "so long as he continues a subject, hath no way to *oblige* his "prince to give him his due, when he refuses it, though no "wise prince will ever refuse to stand to a lawful contract. "And if the prince gives the subject leave to enter an action "against him, upon such contract, in his own courts, the action "itself proceeds rather upon natural equity, than upon the "municipal laws." For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him. And, as to personal wrongs, it is well observed by Locke,[q] "the

[n] Finch, L. 83.
[o] Finch, L. 255; See V. iii. c. 17.
[p] Law of N. and N. b. 8, c. 10.
[q] On Gov. p. 2, § 205.

"harm which the sovereign can do in his own person not being "likely to happen often, nor to extend itself far; nor being "able, by his single strength, to subvert the laws, nor oppress "the body of the people (should any prince have so much "weakness and ill-nature as to endeavour to do it), the incon-"veniency, therefore, of some particular mischiefs, that may "happen sometimes when a heady prince comes to the throne, "are well recompenced by the peace of the public and security "of the government, in the person of the chief magistrate "being thus set out of the reach of danger."

[244] for public oppression, by punishment of ministers. Next as to cases of ordinary *public oppression*, where the vitals of the constitution are not attacked, the law has also assigned a remedy. For as a sovereign cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the Crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws that the king himself can do no wrong; since it would be a great weakness and absurdity in any system of positive law to define any possible wrong, without any possible redress.

For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamental principles of government, they are cases which the law will not, out of decency, suppose; being incapable of distrusting those whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it, the very notion of which destroys the idea of sovereignty. If, therefore (for example), the two Houses of Parliament, or either of them, had avowedly a right to animadvert on the sovereign, or each other, or if the sovereign had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of *law* therefore is, that neither the sovereign nor either House of

Parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions, [245] which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any ***stated rule***, or *express legal* provision; but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides, and threaten desolation to a State, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to these political maxims, which were originally established to preserve it. And therefore, though the positive laws are silent, experience will furnish us with a very remarkable case, wherein nature and reason prevailed. When King James the Second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the Crown. And so far as this precedent leads, and no farther, we may now be allowed to lay down the *law* of redress against public oppression. If, therefore, any future prince should endeavour to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom; we are now authorised to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say that any one or two of these ingredients would amount to such a situation; for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

2. Besides the ***attribute*** of sovereignty, the law also [246] ascribes to the king, in his political capacity, absolute ***per-*** (2). Perfection.

The king can do no wrong.

fection. The king can do no wrong. Which ancient and fundamental maxim is not to be understood, as if everything transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the sovereign, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the Crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the Crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

The sovereign, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing: in him is no folly or weakness. And therefore, if the Crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in anywise prejudicial to the commonwealth, or a private person, the law will not suppose the sovereign to have meant either an unwise or an injurious action, but declares that he was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents whom the Crown has thought proper to employ. For the law will not cast an imputation on that magistrate whom it intrusts with the executive power, as if he was capable of intentionally disregarding his trust: but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) these little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects.

[247] Yet still, notwithstanding this personal perfection which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary, in respect of both Houses of Parliament; each of which, in its turn, has exerted the right of remonstrating and complaining to the king, even of those acts of royalty which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne. And yet, such is the reverence which is paid to the royal person, that though the two houses have an undoubted right to consider those acts of State in any

But parliament may remonstrate.

light whatever, and accordingly treat them in their addresses as personally proceeding from the prince, yet among themselves (to preserve the more perfect decency, and for the greater freedom of debate) they usually suppose them to flow from the advice of the administration. But the privilege of canvassing thus freely the personal acts of the sovereign (either directly, or even through the medium of his reputed advisers) belongs to no individual, but is confined to those august assemblies; and there too the objections must be proposed with the utmost respect and deference. One member was sent to the Tower,[r] for suggesting that his Majesty's answer to the address of the Commons contained "high words to fright "the members out of their duty;" and another,[s] for saying that a part of the king's speech "seemed rather to be calcu"lated for the meridian of Germany than Great Britain, and "that the king was a stranger to our language and constitu"tion."

No laches can be imputed to the sovereign.

In farther pursuance of this principle, the law also determines that on the 'part of the sovereign, there' can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions: for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects.[t] In the [248] king also can be no stain or corruption of blood; for if the heir to the Crown were attainted of treason or felony, and afterwards the Crown should descend to him, this would purge the attainder *ipso facto*.[u] And therefore, when Henry VII., who, as Earl of Richmond, stood attainted, came to the Crown, it was not thought necessary to pass an Act of Parliament to

[r] Com. Journ. 18 Nov. 1685.

[s] Com. Journ. 4 Dec. 1717.

[t] Finch, L. 82; Co. Litt. 90. 'This rule is, however, subject to various exceptions. Thus the statute 9 Geo. III. c. 16, takes away the right of suit of the Crown, or those claiming from the Crown, against such as have held an adverse possession of lands, &c., against it for sixty years. (*Goodtitle* v. *Baldwin*, 11 East, 488). And by stat. 21 Jac. I., after an adverse possession of lands by a subject for twenty years, the Crown can only recover by information of intrusion. (*Doe d. Watt* v. *Morris*, 2 Bing. N. C. 187; *Attorney-General*, v. *Parsons*, 2 M. & W. 23.) In criminal prosecutions, as treasons, felonies, and misdemeanors, which are instituted in the name of the sovereign, there is at common law no limitation. (3 Camp. 227.) But by various statutes, criminal proceedings must now be instituted within certain limited periods of time.'

[u] Finch, L. 82.

reverse this attainder; because, as Lord Bacon in his history of that prince informs us, it was agreed that the assumption of the Crown had at once purged all attainders. Neither can the king in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to Acts of Parliament are good, though he has not, in his natural capacity, attained the legal age of twenty-one.[v] By a statute, indeed, 28 Henry VIII. c. 17, power was given to future kings to rescind and revoke all Acts of Parliament that should be made, while they were under the age of twenty-four: but this was repealed by the statute 1 Edw. VI. c. 11, so far as related to that prince; and both statutes are declared to be determined by 24 Geo. II. c. 24. It has also been usually thought prudent when the heir-apparent has been very young, to appoint a protector, guardian, or regent for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he has no legal guardian.[w]

[v] Co. Litt. 43; 2 Inst. proœm. 3.

[w] The methods of appointing this guardian or regent have been so various, and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the common law; and therefore (as Sir Edward Coke says, 4 Inst. 58) the surest way is to have him made by authority of the great council in Parliament. The Earl of Pembroke, by his own authority, assumed in very troublesome times the regency of Henry III., who was then only nine years old; but was declared of full age by the pope at seventeen, confirmed the great charter at eighteen, and took upon him the administration of the government at twenty. A guardian and council of regency were named for Edward III. by the Parliament which deposed his father; the young king being then fifteen, and not assuming the government till three years after. When Richard II. succeeded at the age of eleven, the Duke of Lancaster took upon him the management of the kingdom, till the Parliament met, which appointed a nominal council to assist him. Henry V. on his death-bed named a regent and a guardian for his infant son Henry VI., then nine months old; but the Parliament altered his disposition, and appointed a Protector and council, with a special limited authority. Both these princes remained in a state of pupilage till the age of twenty-three. Edward V., at the age of thirteen, was recommended by his father to the care of the Duke of Gloucester; who was declared protector by the privy council. The statutes 25 Hen. VIII c. 12, and 28 Hen. VIII. c. 7, provided, that the successor, if a male and under eighteen, or if a female and under sixteen, should be till such age in the government of his or her natural mother (if approved by the king), and such other counsellors as his majesty should by will or otherwise appoint: and he accordingly appointed his sixteen executors to have the government of his son Edward VI. and the kingdom, which executors elected the Earl of Hertford protector. The statute 24 Geo. II. c. 24, in case the Crown should descend to any of the children of Frederick Prince of

3. A third *attribute* of the sovereign is his *perpetuity*. The law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise; demissio regis, vel coronæ;* an expression which signifies merely a transfer of property; for, as is observed in Plowden,[x] when we say the demise of the Crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus, too, when Edward the Fourth, in the tenth year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his *demise;* and all process was held to be discontinued, as upon a natural death of the king.[y] [249] (3). Perpetuity. The king never dies.

We are next to consider those branches of the royal prerogative, which invest the sovereign with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, [250] II. Of the royal authority

Wales under the age of eighteen, appointed the princess dowager; and the Act 5 Geo. III. c. 27, in case of a like descent to any of his children, empowered the king to name either the queen, the princess dowager, or any descendant of King George II. residing in this kingdom, to be guardian and regent, till the successor attained such age, assisted by a council of regency. 'On the alienation of mind of Geo. III., his son, the Prince of Wales (afterwards Geo. IV.) was declared Regent by express Act of Parliament (51 Geo. III. c. 1), but with certain restrictions, which were removed in the year following by 52 Geo. III. c. 8. By the stat. 1 Will. IV. c. 2, the Duchess of Kent was appointed the guardian of her daughter (her present Majesty), until she attained the age of eighteen years; and it was also declared that the Duchess should be the Regent during the queen's minority; but her Majesty having attained the age of eighteen before the death of Wm. IV., no regency took place. Finally, by stat. 3 & 4 Vict. c. 52, his Royal Highness Prince Albert was appointed guardian of any issue of the Queen becoming king or queen of these realms, and Regent, so long as such king or queen should remain under the age of eighteen years.'

[x] Plowd. 177, 234.

[y] M. 49 Hen. VI. pl. 1-8.

and despatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The King 'or Queen' of England is therefore not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him 'or her:' in like manner as, upon the great revolution of the Roman state, all the powers of the ancient magistracy of the commonwealth were concentrated in the new emperor; so that, as Gravina[z] expresses it, "*in ejus unius personâ veteris reipublicæ vis atque majestas per cumulatas magistratuum potestates exprimebatur.*"

In the exercise of lawful prerogative, the king is absolute.

After what has been premised in this chapter, I shall not (I trust) be considered as an advocate for arbitrary power, when I lay it down as a principle, that, in the exercise of lawful prerogative, the sovereign is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases: unless where the constitution has expressly, or by evident consequence, laid down some exception or boundary: declaring, that thus far the prerogative shall go, and no farther. For otherwise the power of the Crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of law; I say, in the *ordinary* course of law; for I do not now
[251] speak of those *extraordinary* recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression. And yet the want of attending to this obvious distinction has occasioned these doctrines, of absolute power in the prince and of national resistance by the people, to be much misunderstood and perverted, by the advocates for slavery on the one hand, and the demagogues of faction on the other. The former observing the absolute

[z] Orig. 1, § 103.

sovereignty and transcendent dominion of the Crown laid down (as it certainly is) most strongly and emphatically in our law-books, as well as our homilies, have denied that any case can be excepted from so general and positive a rule, forgetting how impossible it is, in any practical system of laws, to point out beforehand those eccentric remedies, which the sudden emergency of national distress may dictate, and which that alone can justify. On the other hand, over-zealous republicans, feeling the absurdity of unlimited passive obedience, have fancifully (or sometimes factiously) gone over to the other extreme: and, because resistance is justifiable to the person of the prince, when the being of the state is endangered, and the public voice proclaims such resistance necessary, they have therefore allowed to every individual the right of determining this expediency, and of employing private force to resist even private oppression. A doctrine productive of anarchy and (in consequence) equally fatal to civil liberty as tyranny itself. For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.

In the exertion, therefore, of those prerogatives, which the law has given him, the sovereign is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account. For prerogative consisting [252] (as Locke[a] has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent; if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner. Thus the sovereign may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded.

The prerogatives of the Crown (in the sense under which

[a] On Gov. 2, § 166.

we are now considering them) respect either this nation's intercourse with *foreign* nations, or its own *domestic* government and civil polity.

The royal authority in foreign affairs.

With regard to foreign concerns, the sovereign is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the sovereign, therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the concurrence of the Crown, is the act only of private men. And so far is this point carried by our law, that it has been held,[b] that should all the subjects of England make war with a king in league with the King of England, without the royal assent, such war is no breach of the league. And, by the statute 2 Hen. V. c. 6, any subject committing acts of hostility upon any nation in league with the king was declared to be guilty of high treason: and though that act was repealed by statute 20 Hen. VI. c. 11, so far as relates to
[253] the making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws, either capitally or otherwise, according to the circumstances of the case.

(1). In sending and receiving ambassadors.

1. The sovereign, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home.[c] This may lead us into a short digression, by way of inquiry, how far the municipal laws of England intermeddle with or protect the rights of these messengers from one potentate to another, whom we call ambassadors.

[b] 4 Inst. 152.

[c] 'Doubts having arisen whether diplomatic relations could be established with the Pope, as temporal sovereign of the States of the Church, the statute 11 & 12 Vict. c. 108 was passed, to authorize the Queen to enter into such relations, provided the ambassador or diplomatic agent of the Pope were not an ecclesiastic.'

Privileges of ambassadors.

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state, wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made: but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master,[d] who is bound either to do justice upon him, or avow himself the accomplice of his crimes.[e] But there is great dispute among the writers on the laws of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder.[f] Our law seems to have formerly taken in the restriction, as well as the general exemption. For it has been held, both [254] by our common lawyers and civilians,[g] that an ambassador is privileged by the law of nature and nations; and yet, if he commits any offence against the law of reason and nature, he shall lose his privilege:[h] and that therefore, if an ambassador conspires the death of the sovereign in whose land he is, he may be condemned and executed for treason; but if he commits any other species of treason, it is otherwise, and he must be sent to his own kingdom.[i] And these positions seem to be built upon good appearance of reason. For since, as we have formerly shown, all municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are only declaratory of and auxiliary to that law; therefore to this natural universal rule of justice ambassadors, as well as other men, are subject in all countries;

[d] As was done with Count Gyllenberg, the Swedish minister, A.D. 1716.

[e] Sp. L. 26, 21.

[f] Van Leeuwen, in Ff. 50, 7, 17; Barbeyrac's Puff. l. 8, c. 9, § 9 & 17; Van Bynkershoek, De Foro Legator. c. 17, 18, 19.

[g] 1 Roll. Rep. 175; 3 Bulstr. 27.

[h] 4 Inst. 153.

[i] 1 Roll. Rep. 185.

and of consequence it is reasonable that, wherever they transgress it, they shall be liable to make atonement.[j] But, however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime.[k] And therefore few, if any, examples have happened within a century past, where an ambassador has been punished for any offence, however atrocious in its nature.

In respect to *civil* suits, all the foreign jurists agree, that neither an ambassador, nor any of his train or *comites*, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside. Yet Sir Edward Coke maintains, that if an ambassador make a contract which is good, *jure gentium,* he shall answer for it here.[l] But the truth is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law-books are (in general) quite silent upon it previous to the reign of Queen Anne; when an ambassador from Peter the Great, Czar of Muscovy, was actually arrested and taken
[255] out of his coach in London, for a debt of fifty pounds which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the Queen. The persons who were concerned in the arrest were examined before the Privy Council (of which the Lord Chief Justice Holt was at the same time sworn a member), and seventeen were committed to prison; most of whom were prosecuted by information in the court of Queen's Bench, at the suit of the attorney-general, and at their trial before the Lord Chief Justice were convicted of the facts by the jury, reserving the question of law, how far those facts were criminal, to be afterwards argued before the judges;

[j] Foster's Reports, 188. 'In 1654, Don Pantaleon Sa, brother of the Portuguese ambassador, was arrested by order of Cromwell, and afterwards tried, convicted, and executed for an atrocious murder. (1 Hale, P. C. 99; Foster, 188) The prisoner pleaded the privilege of ambassadors, but failed to prove that he was joined with his brother in the commission; a fact which must have been unknown to Hume and Vattel, who consider the proceedings of the Protector a breach of the law of nations.' (Vattel, b. 4, c. 7.)

[k] *Securitas legatorum utilitati, quæ ex pœnâ est, præponderat.* (*De jure B. & P.* l. 2, c. 18, § 4.)

[l] 4 Inst. 153.

which question was never determined. In the mean time the Czar resented this affront very highly, and demanded that the Sheriff of Middlesex and all others concerned in the arrest should be punished with instant death. But the Queen (to the amazement of that despotic court) directed her secretary to inform him, "that she could inflict no punishment upon "any, the meanest, of her subjects, unless warranted by the "law of the land; and therefore was persuaded that he would "not insist upon impossibilities." To satisfy, however, the clamours of the foreign ministers (who made it a common cause) as well as to appease the wrath of Peter, a bill was brought into parliament, and afterwards passed into a law, to prevent and punish such outrageous insolence for the future. And with a copy of this Act, elegantly engrossed and illuminated, accompanied by a letter from the Queen, an ambassador extraordinary was commissioned to appear at Moscow, who declared, "that though her Majesty could not inflict such a "punishment as was required, because of the defect in that "particular of the former established constitutions of her [256] "kingdom, yet with the unanimous consent of the parliament, "she had caused a new Act to be passed, to serve as a law for "the future." This humiliating step was accepted as a full satisfaction by the Czar: and the offenders, at his request, were discharged from all farther prosecution.[m]

This statute (7 Ann. c. 12) recites the arrest which had been made, "in contempt of the protection granted by her Majesty, "contrary to the law of nations, and in prejudice of the rights "and privileges, which ambassadors and other public ministers "have at all times been thereby possessed of, and ought to be kept sacred and inviolable:" wherefore it enacts, that for the future all process whereby the person of any ambassador, or of his domestic or domestic servant may be arrested, or his goods distrained or seized, shall be utterly null and void:[n] and the persons prosecuting, soliciting or executing such pro-

[m] Boyer's Annals of Queen Anne.

[n] 'It seems doubtful whether the statute extends to prevent persons within it being sued at all in the courts of this country, or only to protect them from process affecting their person or goods. At all events, if the ambassador, or his servants, appear to the action, or attorn to the jurisdiction, they cannot afterwards avail themselves of their privilege. (*Taylor* v. *Best*, 14 C. B. 487.) And the statute does not protect the goods of an ambassador's servant from being distrained for poor-rates.' (*Novello* v. *Toogood*, 1 B. & C. 544.)

cess, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the two chief justices, or any of them, shall think fit.[o] But it is expressly provided, that no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected by this Act; nor shall any one be punished for arresting an ambassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex.[p] Exceptions that are strictly conformable to the rights of ambassadors,[q] as observed in the most civilized countries. And, in consequence of this statute, thus declaring and enforcing the law of nations, these privileges are now held to be part of the
[257] law of the land, and are constantly allowed in the courts of common law.[r]

(2). In making treaties.

2. It is also the prerogative of the Crown to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power;[s] and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc*, is vested in the King. Whatever contracts, therefore, he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) has here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers, as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.

[o] Perhaps it was intended as a compliment to the Czar, that the offenders against this Act are deprived of the trial by jury; and as any corporal punishment may be inflicted that two of these three judges may think fit to award, the Czar would be induced to believe that any future requisition of instant death would be complied with; but as the statute has not made the offence felony, of course, this punishment cannot extend to the privation of life.—[CHRISTIAN.]

[p] 'Any person claiming the protection of the statute as servant of an ambassador, must show by affidavit that he was really and *bonâ fide* in the service of the ambassador at the time of the arrest, and that he was not a trader within the bankrupt laws' (*Fontainier* v. *Heyl*, 3 Burr. 1731; *Heathfield* v. *Chilton*, 4 Burr. 2017; *Delvalle* v. *Plomer*, 3 Campb. 47.)

[q] Van Bynkersh. c. 15, *prope finem*.

[r] Fitzg. 200; Stra. 797.

[s] Puff. L. of N. b. 8, c. 9, § 6.

(3). In making war and peace.

3. Upon the same principle also the sole prerogative of making war and peace is vested in the Crown. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power:[t] and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities, therefore, may be committed by private citizens, the state ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law—[u] *hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: cæteri latrones aut prædones sunt.* And the reason which is given by Grotius,[v] why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard (which is matter rather of magnanimity than right), but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the royal authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the Crown from a wanton or injurious exercise of this great prerogative.

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[t] Puff. b. 8, c. 6, § 8, and Barbeyr. in loc.

[u] Ff. 50, 16, 118.

[v] De Jure B. & P. l. 3, c. 3, § 11.

(4). In issuing letters of marque.

4. But as the delay of making the war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative; by directing the ministers of the Crown to issue letters of marque and reprisal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations,[w] whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisals (words used as synonymous, and signifying, the latter, a taking in return, the former, the passing the frontiers in order to such taking)[x] may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found. And
[259] indeed this custom of reprisal seems dictated by nature herself; for which reason we find in the most ancient times very notable instances of it.[y] But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle, it is with us declared by the statute 4 Hen. V. c. 7, that if any subjects of the realm are oppressed in the time of truce by any foreigners, the king will grant marque in due form, to all that feel themselves grieved. Which form is thus directed to be observed: the sufferer must first apply to the lord privy-seal: and he shall make out letters of request under the privy-seal; and if, after such request of satisfaction made, the party required do not within a convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of marque under the great seal; and by virtue of

[w] De Jure B. & P. l. 3, c. 2, § 4 & 5.

[x] Dufresne, tit. *Marca*.

[y] See the account given by Nestor, in the eleventh book of the Iliad, of the reprisals made by himself on the Epeian nation; from whom he took a multitude of cattle, as a satisfaction for a prize won at the Elian games by his father Neleus, and for debts due to many private subjects of the Pylian kingdom, out of which booty the king took three hundred cattle for his own demand, and the rest were equitably divided among the other creditors.

these he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate. 'But the granting of letters of marque under this statute to persons actually aggrieved has long been disused.'

'If during war, a subject, without a commission from the Crown, should take an enemy's ship, the prize would belong, not to the captor but to the sovereign, or to the admiral as his grantee.[z] In order, therefore, to encourage the fitting out of armed ships in time of war, the lord high admiral, or the commissioners of the admiralty, are authorised by several statutes to grant commissions to private persons fitting out such ships, which are thence called privateers.[a] The prizes captured by such vessels are divided according to the contract entered into between the owners and the master and crew of the privateer; but the Crown has still the prerogative of releasing any prize captured by such ships at any time previously to condemnation.[b] Letters of marque, as these commissions are called, are valid only during the war, and may be vacated either by express revocation, or by the misconduct of the parties,[c] as, for example, by their cruelty.'[d]

Privateers.

5. Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations, no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves,[e] that it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coast by necessity, or by any cause that deserves pity or compassion. Great tenderness is shown by our laws, not only to foreigners in distress (as will

(5). In granting passports.

[z] Carth. 399; 2 Woodd. 433.

[a] 29 Geo. II. c. 34; 19 Geo. III. c. 67; 24 Geo. III. c. 47.

[b] *Stirling* v. *Vaughan*, 11 East, 619.

[c] 5 Rob. Adm. Rep. 9.

[d] 'The Conference which met at Paris in 1856, after the close of the war with Russia, closed its labours by recommending to the established governments of the world, the entire abolition of the system of privateering, and that in time of war neutral flags and neutral goods should be alike inviolable. The Conference was of opinion that the abolition of privateering and the acknowledgment of neutral rights were alike desirable and necessary for improving our system of war, and bringing it into harmony with the ideas and principles of modern civilization. This proclaimed opinion of several of the great powers of Europe may therefore lead, ere long, to treaties, by which the prerogative of the Crown in issuing letters of marque will become merely matter of history.'

[e] Law of N. and N. b. 3, c. 3, § 9.

appear when we come to speak of shipwrecks) but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the protec-
[260] tion of the laws; though liable to be sent home whenever the sovereign sees occasion.[f] But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which by divers ancient statutes[g] must be granted under the great seal and enrolled in chancery, or else are of no effect: the sovereign being supposed the best judge of such emergencies, as may deserve exemption from the general law of arms. But passports under the sign-manual, or licenses from our ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity. 'A subject of a friendly state, however, may freely enter and as freely leave the realm; but when he enters, he is required by the statute 6 & 7 Will. IV. c. 11, to make a declaration of his name and country, of the registration of which a certificate is given to him, to be delivered up on his again leaving the country, the object of this registration being to keep the government informed of the number and names of resident foreigners, so that criminals or persons infringing our laws may be summarily removed from the kingdom.'

Indeed the law of England, as a commercial country, pays a very particular regard to foreign merchants, in innumerable instances. One I cannot omit to mention: that by *Magna Charta* it is provided that all merchants (unless publicly prohibited beforehand) shall have safe-conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandise, without any unreasonable imposts, except in time of war: and if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they

[f] See stat. 6 & 7 Will. IV. c. 11; 7 & 8 Vict. c. 66; 10 & 11 Vict. c. 83.

[g] 15 Hen. VI. c. 3; 18 Hen. VI. c. 8; 29 Hen. VI. c. 2.

shall be secure in ours.[h] This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook,[i] that it was a maxim among the Goths and Swedes, *quam legem exteri nobis posuere, eandem illis ponemus.* But it is somewhat extraordinary that it should have found a place in *Magna Charta*, a mere interior treaty between the king and his natural-born subjects: which occasions the learned Montesquieu to remark with a degree of admiration, "that the English have made the protection of *foreign* merchants one of the articles of their *national* liberty."[j] But indeed it well justifies another observation which he has made,[k] "that the English know better than any other people upon earth, how to value at the same time these three great advantages, religion, liberty and commerce." Very different from the genius of the Roman people; who in their manners, their constitution, and even in their laws, treated commerce as a dishonourable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune:[l] and equally different from the bigotry of the canonists, who looked on trade as inconsistent with Christianity,[m] and determined at the council of Melfi, under Pope Urban II. A. D. 1090, that it was impossible with a safe conscience to exercise any traffic, or follow the profession of the law.[n] [261]

The royal authority in domestic affairs.

These are the principal prerogatives of the sovereign respecting this nation's intercourse with *foreign* nations; in all of which he is considered as the delegate or representative of his people. But in *domestic* affairs he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

[h] 'On the occasion of the declaration of war against Russia, in 1854, time was, by proclamation, allowed to the subjects of that empire to remove from the kingdom, and also to complete their shipments and clear their vessels at all our ports. Vessels returning from foreign ports to those of Russia were also for a certain period of time exempted from capture.'

[i] *De Jure Sueon.* l. 3, c. 4.

[j] Sp. L. 20, 13.

[k] Sp. L. 20, 6.

[l] *Nobiliores natalibus, et honorum luce conspicuos, et patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus.* (*C.* 4, 63, 3)

[m] *Homo mercator vix aut nunquam potest Deo placere; et ideo nullus christianus debet esse mercator; aut si voluerit esse, projiciatur de ecclesiâ Dei.* (*Decret.* 1, 88, 11.)

[n] *Falso fit pœnitentia* [*laici*] *cum penitus ab officio curiali vel negotiali non recedit, quæ sine peccatis agi ullâ ratione non prævalet.* (*Act. Concil. apud Baron.* c. 16.)

(1). The sovereign a part of the legislature.

1. First, he is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament, as he judges improper to be passed. The expediency of which constitution has before been evinced at large. I shall only farther remark, that the sovereign is not bound by any Act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, bodies politic or corporate, &c.") affect not him in the least, if they [262] may tend to restrain or diminish any of his rights or interests.[o] For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject. Yet, where an Act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the Crown, it is said to be binding as well upon the sovereign as upon the subject:[p] and, likewise, the sovereign may take the benefit of any particular Act, though he be not especially named.[q]

(2). Generalissimo in military and naval affairs.

2. The sovereign is considered, in the next place, as the generalissimo, or the first in the military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: and the principal use of government is to direct that united strength in the best and most effectual manner, to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.

In his capacity can raise armies;

In this capacity therefore, of general of the kingdom, the sovereign has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated I shall speak more, when I come to consider the military state. We are now only to consider the prerogative of enlisting and of governing them; which indeed was disputed and claimed, contrary to all reason and precedent, by the Long Parliament of King Charles I.; but, upon the restor-

[o] Case of *Magdalen College*, 11 Rep. 74.

[p] 11 Rep. 71.

[q] 7 Rep. 32.

ation of his son, was solemnly declared by statute 13 Car. II. c. 6, to be in the king alone; for that the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was [263] and is the undoubted right of his majesty, and his royal predecessors, kings and queens of England; and that both or either house of parliament cannot, nor ought to, pretend to the same.

This statute, it is obvious to observe, extends not only to fleets and armies, but also to forts and other places of strength, within the realm: the sole prerogative as well of erecting, as manning and governing of which belongs to the sovereign in his capacity of general of the kingdom:[r] and all lands were formerly subject to a tax, for building of castles wherever the king thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the *trinoda necessitas: sc. pontis reparatio, arcis constructio, et expeditio contra hostem.*[s] And this they were called upon to do so often that, as Sir Edward Coke from M. Paris assures us,[t] there was in the time of Henry II. 1115 castles subsisting in England. The inconveniences of which, when granted out to private subjects, the lordly barons of those times, were severely felt by the whole kingdom; for, as William of Newburgh remarks in the reign of King Stephen, "*erant in Angliâ quodammodo tot reges vel potius tyranni quot domini castellorum:*" but it was felt by none more sensibly than by two succeeding princes, King John and King Henry III. And, therefore, the greatest part of them being demolished in the barons' wars, the kings of after times have been very cautious of suffering them to be rebuilt in a fortified manner: and Sir Edward Coke lays it down,[u] that no subject can build a castle, or house of strength, embattled, or other fortress defensible, without the license of the Crown; for the danger which might ensue, if every man at his pleasure might do it.

build forts;

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the sovereign has the

appoint ports and havens;

r 2 Inst. 30.

s Cowel's Interp. tit. *castellorum operatio;* Seld. *Jan. Ang.* 1, 42.

t 2 Inst. 31.

u 1 Inst. 5.

prerogative of appointing *ports* and *havens*, or such places only [264] for persons and merchandise to pass into and out of the realm, as he in his wisdom sees proper. By the feudal law all navigable rivers and havens were computed among the *regalia*,[v] and were subject to the sovereign of the state. And in England it has always been holden, that the sovereign is lord of the whole shore,[w] and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm:[x] and therefore, so early as the reign of King John, we find ships seized by the king's officers for putting in at a place that was not a legal port.[y] These legal ports were undoubtedly at first assigned by the Crown; since to each of them a court of portmote is incident,[z] the jurisdiction of which must flow from the royal authority: the *great ports* of the sea are also referred to, as well known and established by statute 4 Hen. IV. c. 20, which prohibits the landing elsewhere under pain of confiscation; and the statute 1 Eliz. c. 11, recites, that the franchise of lading and discharging had been frequently granted by the Crown.

assign wharfs and quays;

But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandise in any part of the haven; whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the statutes of 1 Eliz. c. 11, and 13 & 14 Car. II. c. 11, s. 14, which enabled the Crown by commission to ascertain the limits of all ports, and to assign proper *wharfs* and *quays* in each port, for the exclusive landing and loading of merchandize. This power of appointing ports and quays, and declaring their limits, is now vested in the commissioners of the Treasury.[a] And by statute 46 Geo. III. c. 153, no pier, jetty, or embankment, shall be erected in or near to any public harbour, without giving one month's notice to the secretary of the Admiralty, under a penalty of 200*l.*, to be recovered by action or information. The privileges of the city

[v] 2 Feud. t. 56; Crag. 1, 15, 15.

[w] F. N. B. 113.

[x] Dav. 9, 56. *Mayor of Exeter* v. *Warren*, 5 Q. B. 773.

[y] Madox. Hist. Exch. 530.

[z] 4 Inst. 148.

[a] The 'Customs Consolidation Act, 1853' (16 & 17 Vict. c. 107), s. 9.

of London, and of the lord mayor as conservator of the Thames and Medway, are reserved by the statute.'

The erection of beacons, lighthouses, and sea-marks, is also a branch of the royal prerogative: whereof the first was anciently used in order to alarm the country, in case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king has the exclusive power, by commission under his great seal,[b] to cause them to be erected in fit and convenient places,[c] as well upon the lands of the subject as upon the demesnes of the Crown: which power is usually vested by letters patent in the office of lord high admiral,[d] 'or the lords commissioners exercising such office.' By the statute 8 Eliz. c. 13, the corporation of the Trinity-house were empowered to set up any beacons or sea-marks wherever they should think them necessary; and if the owner of the land or any other person destroyed them, or took down any steeple, tree, or other known sea-mark, he forfeited 100*l.*, or in case of inability to pay it, he was *ipso facto* outlawed. 'Although that particular statute, and others passed to amend it, have been repealed, the superintendence and management of all lighthouses, buoys, and beacons in England and Wales and the Channel Islands is still vested in the Trinity-house.'[e]

erect light-houses and sea-marks;

[265]

To this branch of the prerogative may also be referred the power vested in the sovereign by statute '8 & 9 Vict. c. 86, of licensing the importation of arms, ammunition, and utensils of war for furnishing the public stores, and of prohibiting the exportation of arms, ammunition, gunpowder, and military and naval stores, and any article (except copper) convertible into military or naval stores:' and likewise the right which the sovereign has, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas. By the common law,[f] every man may go out of the realm for whatever cause he pleases, without obtaining the leave of the Crown; provided he is under no injunction of staying at home (which liberty was expressly declared in King John's great charter, though left out in that of Henry III.); but, because that every man ought of right to

prohibit exportation of arms.

and prevent subjects from leaving the kingdom.

[b] 3 Inst. 204; 4 Inst. 148.

[c] Rot. Claus. 1 Ric. II. m. 42; Pryn. on 4 Inst. 136.

[d] Sid. 158; 4 Inst. 149.

[e] 17 & 18 Vict. c. 104, s. 389.

[f] F. N. B. 85.

defend the sovereign and his realm, therefore the sovereign at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm, without license; and, if he do the contrary, he shall be punished for disobeying the sovereign's command. Some persons there anciently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without license obtained; among which were reckoned all peers, on account of their being counsellors of the Crown; all knights, who were bound to defend
[266] the kingdom from invasions; all ecclesiastics, who were expressly confined by the fourth chapter of the constitutions of Clarendon, on account of their attachment in the time of popery to the see of Rome; all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures. This was the law in the times of Britton,[g] who wrote in the reign of Edward I.: and Sir Edward Coke[h] gives us many instances to this effect in the time of Edward III. In the succeeding reign the affair of travelling wore a very different aspect; an Act of Parliament being made,[i] forbidding all persons whatever to go abroad without license; except only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers. But this Act was repealed by the statute 4 Jac. I. c. 1. And at present everybody has, or at least assumes, the liberty of going abroad when he pleases. Yet undoubtedly if the sovereign by the writ of *ne exeat regno*, under his great seal or privy seal, thinks proper to prohibit him from so doing,[j] and the subject disobeys, it is a high contempt of the royal prerogative, for which the offender's lands shall be seized till he return; and then he is liable to fine and imprisonment.[k]

g C. 123.

h 3 Inst. 179.

i 5 Ric. II. st. 1, c. 2.

j 'The writ of *ne exeat regno* was at first employed to prevent the clergy from going to Rome; it was afterwards extended to laymen concerning measures against the state; and has at length become a part of the ordinary process of the Court of Chancery, in order to get bail from any person who is about to go abroad, so as to withdraw his person or property from the jurisdiction of the Court. The legality of this application of the writ was settled in the time of King Charles II., and its use soon became so fully established, that the granting of it has long been considered a matter of right.' (Beames on *Ne Exeat Regno*.)

k 1 Hawk. P. C. 22. 'Sir William Blackstone adds here, that the king may' send a writ to any man when abroad commanding his return; 'but the exercise of this prerogative has been long disused, and it is not at all probable that it will ever be resumed.' (3 Inst. 84.)

(3): Is the fountain of justice.

III. Another capacity, in which the sovereign is considered in domestic affairs, is as the *fountain of justice* and general conservator of the peace of the kingdom. By the fountain of justice the law does not mean the *author* or *origin*, but only the *distributor*. Justice is not derived from the sovereign, as from his *free gift;* but he is the steward of the public, to dispense it to whom it is *due*.[1] He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the [267] society at large; but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the sovereign or his substitutes. He therefore has alone the right of erecting courts of judicature; for, though the constitution of the kingdom has intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust; it is consequently necessary, that courts should be erected, to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the Crown, their proceedings run generally in the sovereign's name, they pass under his seal, and are executed by his officers.[m]

Appoints the Judges;

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our sovereign in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our sovereigns have delegated their

[1] *Ad hoc autem creatus est et electus, ut justitiam faciat universis.* Bract. l. 3, tr. 1, c. 9.

[m] 'But Courts erected by the sovereign can only proceed according to the course of the common law. The Queen, for instance, could not now erect a court of chancery or a court of conscience, although she might grant the franchise of a market and the court of pie-poudre incident thereto. (Com. Dig. *Prerogative*, D. 28.) Courts whose procedure is not according to the course of the common law can only be erected by Act of Parliament, as, for example, the Courts of Bankruptcy and Insolvency, and the new County Courts.'

whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the Crown itself cannot now alter but by Act of Parliament.[n]

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removeable at pleasure by the Crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative. For which reason, by the statute of 16 Car. I. c. 10, which abolished the Court of Star-Chamber, effectual care is taken to remove all judicial power out of the hands of the privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided in a free constitution, than uniting the provinces of a judge and a minister of state.

In order to maintain both the dignity and independence of the judges in the Superior Courts, it is enacted by the statute 13 Will. III. c. 2, that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it shall be lawful to remove them on the address of both houses of parliament;[o] 'a provision which has been re-enacted

[n] 2 Hawk. P. C. 2.

[o] 'Sir William Blackstone here adds, that' by the noble improvements of that law in the statute of 1 Geo. III. c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare, that "he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and

in several subsequent statutes, enabling the Crown to appoint additional judges.'[p]

In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity if the sovereign personally sat in judgment, because in regard to these he appears in another capacity, that of *prosecutor*. All offences are 'theoretically' against either the peace of the sovereign or his Crown and dignity: and formerly must have been so laid in every indictment.[q] For though in their consequences they generally seem (except in the case of treason, and a very few others) to be rather offences against the kingdom than the Crown; yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution (wherein the sovereign was bound by his coronation oath to conserve the peace), that in case of any forcible injury offered to the person of a fellow-subject, the offender was accused of a kind of perjury, in having violated the coronation oath; *dicebatur fregisse juramentum regis juratum.*[r] And hence also arises another branch of the prerogative, that of *pardoning* offences; for it is reasonable that he only who is injured should have the power of forgiving.[s] Of prosecutions and pardons I shall treat more at large hereafter; and only mention them here, in this cursory manner, to show

Is public prosecutor in criminal matters; [268]

[269] can pardon offences;

liberties of his subjects; and as most conducive to the honour of the Crown." (Bl. Com. vol. i. p. 267.) 'The learned commentator much exaggerates the value of the statute 1 Geo III. c. 23.' "The independence of the judges," says Mr. Hallam, "we owe to the Act of Settlement, not, as ignorance and adulation have perpetually asserted, to George the Third." (Hallam's Const. Hist. v. iii. ch. 15.)

[p] 5 Vict. c. 5; 14 & 15 Vict. c. 83.

[q] This is now unnecessary, 14 & 15 Vict. c. 100, s. 24.

[r] Stiernh. de Jure Goth. l. 3, c. 3. A notion somewhat similar to this may be found in the Mirror, c. 1, § 5. And so also, when the chief justice Thorpe was condemned to be hanged for bribery, he was said *sacramentum domini regis fregisse*. (Rot. Parl. 25 Edw. III.)

[s] 'The prerogative of mercy would seem to be lodged in the Crown, not so much from the legal fiction that the sovereign is the injured party, as from the necessity of placing it where it may be promptly and judiciously exercised. The executive has, therefore, in all countries naturally and necessarily been invested with this prerogative.' (3 Inst. 233; Shower, 284; Ld. Raym. 214; 2 T. R. 569.)

the constitutional grounds of this power of the Crown, and how regularly connected all the links are in this vast chain of prerogative.

is always present in court;

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A consequence of this prerogative is the legal *ubiquity* of the sovereign. In the eye of the law he is always present in all his courts, though he cannot personally distribute justice.[t] His judges are the mirror by which his image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. And from this ubiquity it follows, that the Crown can never be nonsuit;[u] for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings, the sovereign is not said to appear *by his attorney*, as other men do; for in contemplation of law he is always present in court.[v]

and can issue proclamations.

From the same origin of the sovereign being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in him alone. These proclamations have then a binding force, when (as Sir Edward Coke observes)[w] they are grounded upon and enforce the laws of the realm. For though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the sovereign shall judge necessary. Thus the established law is, that the sovereign may prohibit any of his subjects from leaving the realm: a proclamation therefore forbidding this in general for three

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weeks, by laying an embargo upon all shipping in time of war,[x] will be equally binding as an Act of Parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat

[t] Fortesc. c. 8; 2 Inst. 186.

[u] Co. Litt. 139. 'But the attorney-general may enter a *non vult prosequi*, which has the same effect as a *nonsuit* in a civil action.'

[v] Finch. L. 81. [w] 3 Inst. 162. [x] 4 Mod. 177, 179.

(though in the time of a public scarcity) being contrary to law, and particularly to statute 22 Car. II. c. 13, the advisers of such a proclamation, and all persons acting under it, found it necessary to be indemnified by a special Act of Parliament, 7 Geo. III. c. 7. A proclamation for disarming papists was binding, 'so long as it was' in execution of what the legislature had first ordained: but a proclamation for allowing arms to papists, or for disarming any protestant subjects, would not bind, because the first would have been to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person the laws of England are absolutely strangers. Indeed by the statute 31 Hen. VIII. c. 8, it was enacted, that the king's proclamation should have the force of Acts of Parliament; a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after.[y]

(4). Is the fountain of honour.

IV. The sovereign is likewise the *fountain of honour, of office*, and *of privilege;* and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions: and the law supposes that no one can be so good a judge of their several merits and services, as the sovereign himself who employs them. It has therefore intrusted him with the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. And therefore all degrees of [272] nobility, of knighthood, and other titles, are received by immediate grant from the Crown: either expressed in writing, by writs or letters patent, as in the creation of peers and

[y] 1 Edw. VI. c. 12. 'The statute 31 Hen. VIII. c. 8, contained a proviso, that such proclamations should not be prejudicial to any person's inheritance, offices, liberties, goods, and chattels, or infringe the established laws. The penalty for disobedience was fine and imprisonment, unless the proclamation concerned "any kind of heresies against Christian doctrine" which might be punished with death. Upon this statute were grounded all the changes in the national religion made during the minority of Edward VI.'

baronets; or by corporeal investiture, as in the creation of a simple knight.

Can bestow honours and offices;

From the same principle also arises the prerogative of erecting and disposing of offices; for honours and offices are in their nature convertible and synonymous. All offices under the Crown carry in the eye of the law an honour along with them, because they imply a superiority of parts and abilities, being supposed to be always filled by those that are most able to execute them. And, on the other hand, all honours in their origin had duties or offices annexed to them: an earl, *comes*, was the conservator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the same reason therefore that honours are in the disposal of the sovereign, offices ought to be so likewise; and as the sovereign may create new titles, so may he create new offices; but with this restriction, that he cannot create new offices, with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject, which cannot be imposed but by Act of Parliament.[z] Wherefore, in 13 Hen. IV., a new office being created by the king's letters patent for measuring cloths, with a new fee for the same, the letters patent were, on account of the new fee, revoked and declared void in parliament.

grant precedence;

Upon the same, or a like reason, the sovereign has also the prerogative of conferring privileges upon private persons. Such as granting place or precedence to any of his subjects, as shall seem good to his royal wisdom:[a] or such as converting aliens, or persons born out of his dominions, into denizens; whereby some very considerable privileges of natural-born subjects are conferred upon them. Such also is the prerogative of erecting corporations; whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their political capacity, which they were utterly incapable of in their natural. Of aliens, denizens, natural-born, and naturalized subjects, I shall speak more largely in a subsequent chapter; as also of corporations at the close of this book of our commentaries.

and erect corporations.

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[z] 2 Inst. 533.

[a] 4 Inst. 361. 'The royal prerogative, to give a peer, on his creation, precedence before all others of the same rank, was restrained by the statute 31 Hen. VIII. c. 10, which settles the place or precedence of all the nobility and great officers of state. This prerogative was unrestrained in Ireland, until the fourth article of the Union extended the statute of Henry VIII., if not to all peers of Ireland, at least to all peers of the United Kingdom created after the Union.'

I now only mention them incidentally, in order to remark the royal prerogative of making them, which is grounded upon this foundation, that the sovereign, having the sole administration of the government in his hands, is the best and only judge in what capacities, with what privileges, and under what distinctions his people are best qualified to serve, and to act under him. A principle, which was carried so far by the imperial law, that it was determined to be the crime of sacrilege, even to doubt whether the prince had appointed proper officers in the state.[b]

V. Another light, in which the laws of England consider the sovereign with regard to domestic concerns, is as the *arbiter of commerce*. By commerce, I at present mean domestic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of foreign trade, its privileges, regulations, and restrictions; and would also be quite beside the purpose of these Commentaries, which are confined to the laws of England: whereas no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandize; neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law merchant, or *lex mercatoria*, which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the cause of merchants by the general rules which obtain in all commercial countries; and that often even in matters relating to domestic trade, as for instance with regard to the drawing, the acceptance, and transfer of inland bills of exchange.[c] (5). Is the arbiter of commerce.

'To this branch of the prerogative may be referred the important functions which are now exercised by the Board of Trade. On the Restoration, in 1660, Charles II. created a Council for Trade and a Council for Foreign Plantations; but in 1672 these two councils were superseded by a United Council of Trade and Plantations. Being abolished, however, in 1675, its duties were exercised by the Privy Council until 1695, when the Board of Trade and Plantations

[b] *Disputare de principali judicio non oportet; sacrilegii enim instar est, dubitare an is dignus sit, quem elegerit imperator.* C. 9, 29, 3.

[c] Co. Litt. 172; Ld. Raym. 181, 1542.

was again revived, but only to be finally abolished in 1782 by the statute 22 Geo. III. c. 82, when the business, so far as relates to the colonies, was transferred to the Secretary of State, while the remainder of its duties were performed by a Committee of the Privy Council. Four years afterwards, namely, in 1786, a separate department or Board of Trade was established by an Order in Council, for all matters specially relating to trade and the colonies, and it is to this Board, consisting of a President and Vice-President (who are always members of the Executive Government), with two assistant secretaries and a number of other officers and clerks, that many important interests relating to trade and commerce are confided, involving a correspondence with the great mercantile interests of the country, to advise the other departments of the Government upon those subjects, and to superintend the conduct of all Government measures brought before Parliament relating to trade and commerce.'

The Board of Trade.

'With respect to many branches of trade and commerce, the Board of Trade has also, by various statutes, several duties to perform, some of them of a ministerial and others of a judicial character.'

Its duties as to merchant shipping;

'Thus the Board of Trade has the general superintendence of matters relating to merchant ships and seamen, and the carrying into execution the statutes in force relating to them. For that purpose it has to require and receive various kinds of returns as to trade and navigation, and originate and consider reports made to it by its inspectors and other officers. The Board has also a partial control over local marine boards, and may lay down rules as to the conduct of examinations, and as to the qualification of applicants for the posts of masters and mates of foreign-going as well as of home-trade passenger-ships. It may grant licenses to persons to engage or supply seamen or apprentices for merchant ships in the United Kingdom, inquire into and adjudicate on claims for wages, and investigate cases of alleged incompetency and misconduct.[d] The Board also appoints officers to report on the condition and efficiency of steam-vessels and their machinery.'[e]

as to railways;

'The Board of Trade exercises a supervision over railways and railway companies, not only with respect to their original formation, but also as to their subsequent working. Railways were first placed under this control by the statute 3 & 4 Vict.

[d] 17 & 18 Vict. c. 104. [e] 14 & 15 Vict. c. 79.

c. 97. A few years afterwards the powers of the Board of Trade in this respect were transferred to a Board of Commissioners of Railways;[f] but in 1851 all the powers of this latter board were re-transferred to the Board of Trade, in whom they are now vested.[g] Notices of application for Railway Acts, accompanied by plans, must be deposited with the Board, before any bill can be introduced into Parliament; and before a line can be opened for traffic notice must be given to the Board and its permission obtained, on the report of an inspector, appointed by the Board for those and other general purposes. So when accidents occur, notice must be given to the Board, and an inspector is generally sent to inquire into the circumstances, and on his report the Board may cause alterations to be made for the greater safety of the public.'

'Again, the Board of Trade, through the medium of its registrar, is charged with the registration of all Joint-Stock Companies under the recent statute 19 & 20 Vict. c. 47. This duty of registration, however, existed under the previous Registration Act, 7 & 8 Vict. c. 110. By the statute giving a copyright in designs, their registration is effected by the Registrar of the Board of Trade.[h] The schools of design now established in almost all large towns are also under the immediate control of this Board, the appointments connected with them being made by its President, parliament voting annually a sum of money for their support. The Board of Trade also controls the proceedings of the Commissioners for regulating the employment of coal-whippers and the discharge of coal-laden vessels in the port of London.[i] Lastly, a department of the Board of Trade is charged with the collection and publication from time to time of tables, containing information with respect to the revenue, trade, commerce, wealth, population, and other statistics of the United Kingdom and its dependencies, as well as of foreign countries. The officers of another department collect and prepare the tables of the prices of corn which formerly, and before the abolition of the corn-laws, regulated the amount of duty, and still govern the rent-charge in lieu of tithe under the Tithe Commutation Act.'

as to joint-stock companies.

'Subject to these general observations,' the royal prero- [274]

[f] Stat. 9 & 10 Vict. c. 105.

[g] Stat. 14 & 15 Vict. c. 64.

[h] 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 14 & 15 Vict. c. 8; 15 & 16 Vict. c. 6.

[i] 6 & 7 Vict. c. ci. (local and personal); 9 & 10 Vict. c. xxxvi.; 14 & 15 Vict. c. lxxviii.

gative, so far as it relates to mere domestic commerce, falls the following articles:

May establish public markets;

First, the establishment of *public marts*, or places of buying and selling; such as markets and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the grant of the Crown, or by long and immemorial usage and prescription, which presupposes such a grant.[j] The limitation of these public resorts, to such time and such place as may be most convenient for the neighbourhood, forms a part of economics or domestic polity; which considering the kingdom as a large family, and the sovereign as the master of it, he clearly has a right to dispose and order as he pleases.

regulate weights and measures;

Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard: which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot rule, or a pound weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size: and the prerogative of fixing this standard our ancient law vested in the Crown, as in Normandy it belonged to the duke.[k] This standard was originally kept at Winchester: and we find in the laws of King Edgar,[l] nearly a century before the Conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of measures of length by comparison with the parts
[275] of the human body; as the palm, the hand, the span, the foot, the cubit, the ell (*ulna*, or arm), the pace, and the fathom. But as these are of different dimensions in men of different proportions, our ancient historians[m] inform us, that a new standard of longitudinal measure was ascertained by King Henry the First; who commanded that the *ulna* or ancient ell, which answers to the modern yard, should be made of the

[j] 2 Inst. 220. *Mayor of Macclesfield* v. *Chapman*, 12 M. & W. 18.

[k] Gr. Coustum. c. 16.

[l] Cap. 8; 1 Thorpe, 271.

[m] Will. Malmsb. *in vitâ* Hen. I.; Spelm. Hen. I. *apud* Wilkins, 299.

exact length of his own arm. And, one standard of measures of length being gained, all others are easily derived from thence; those of greater length by multiplying, those of less by subdividing, that original standard. Thus, by the statute called *compositio ulnarum et perticarum*, five yards and a half make a perch; and the yard is subdivided into three feet, and each foot into twelve inches; which inches will be each of the length of three grains of barley. Superficial measures are derived by squaring those of length; and measures of capacity by cubing them. The standard of weights was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called a grain; thirty-two of which are directed, by the statute called *compositio mensurarum*, to compose a pennyweight, whereof twenty make an ounce, twelve ounces a pound, and so upwards. And upon these principles the first standards were made; which, being originally so fixed by the Crown, their subsequent regulations have been generally made by the sovereign in parliament. Thus, under King Richard I., in his parliament holden at Westminster, A. D. 1197, it was ordained that there should be only one weight and one measure throughout the kingdom, and that the custody of the assize or standard of weights and measures should be committed to certain persons in every city or borough;[n] from whence the ancient office of the king's aulnager seems to have been derived, whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the statute 11 & 12 Will. III. c. 20. In King John's time this ordinance of King Richard was frequently dispensed with for money;[o] which occasioned a provision to be made for enforcing it, in the great charters of King John and his son.[p] [276] These original standards were called *pondus regis*,[q] and *mensura domini regis*;[r] and were directed by a variety of subsequent statutes to be kept in the exchequer, and all weights and measures to be made conformable thereto. But, as Sir Edward Coke observes,[s] though this hath so often by authority of parliament been enacted, yet it could never be effected; so forcible is custom with the multitude.

'The regulation of weights and measures having so frequently formed the subject of parliament enactment cannot

[n] Hoved. Matth. Paris.
[o] Hoved. A.D. 1201.
[p] 9 Hen. III. c. 25.
[q] Cowel's Interp. tit. *pondus regis*.
[r] Flet. 2, 12.
[s] 2 Inst. 41.

now be referred to the royal prerogative. Upwards of twenty statutes, extending from 14 Edward III. to 43 Geo. III., were repealed by the statute 5 Geo. IV. c. 74, by which and the statutes 6 Geo. IV. c. 12, 4 & 5 Will. IV. c. 49, and 5 & 6 Will. IV. c. 63, the imperial standard yard, pound, gallon, and bushel, have been fixed and rendered uniform throughout the United Kindom. All articles sold by weight must be sold by *avoirdupois* weight (except the precious metals and precious stones), which may be sold by troy weight; and drugs, which, if sold by retail, may be sold by apothecaries' weight: and all contracts for sale by weight or measure, except when an express agreement is made to the contrary, are considered to refer to these standards. By the statute 5 & 6 Will. IV. c. 63, all local and customary measures and also heaped measures are abolished, and contracts made with reference to them are declared void. The imperial standard yard and standard pound troy having been destroyed in the fire at the Houses of Parliament in 1834, and doubts moreover existing as to the accuracy of the methods provided by the Act 5 Geo. IV. c. 74, scientific men have constructed a standard yard and pound, which have been recently legalized, and copies deposited in various places; and these now, by the statute 18 & 19 Vict. c. 72, constitute the standard measure and weight of the United Kingdom.'

and give currency to coin.

Thirdly, as money is the medium of commerce, it is the royal prerogative, as the arbiter of domestic commerce, to give it authority, or make it current. Money is a universal medium, or common standard, by comparison with which the value of all merchandise may be ascertained: or it is a sign, which represents the respective values of all commodities. Metals are well calculated for this sign, because they are durable, and are capable of many subdivisions; and a precious metal is still better calculated for this purpose, because it is the most portable. A metal is also the most proper for a common measure, because it can easily be reduced to the same standard in all nations: and every particular nation fixes on it its own impression, that the weight and standard (wherein consists the intrinsic value) may both be known by inspection only.

As the quantity of precious metals increases, that is, the more of them there is extracted from the mine, this universal medium or common sign will sink in value, and grow less precious. Above a thousand millions of bullion are calculated to have been imported into Europe from America within less

than three centuries; and the quantity is daily increasing. The consequence is, that more money must be given now for the same commodity than was given a hundred years ago. [277] And if any accident were to diminish the quantity of gold and silver, their value would proportionably rise. A horse that was formerly worth ten pounds, is now perhaps worth twenty: and by any failure of current specie, the price may be reduced to what it was. Yet is the horse in reality neither dearer or cheaper at one time than another: for, if the metal which constitutes the coin was formerly twice as scarce as at present, the commodity was then as dear at half the price as now it is at the whole.

The coining of money is in all States the act of the sovereign power; for the reason just mentioned, that its value may be known on inspection. And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.

With regard to the materials, Sir Edward Coke lays it down,[t] that the money of England must either be of gold or silver: and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by King Charles the Second, and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it. And, as to the silver coin, it is enacted by the statute '56 Geo. III. c. 68,' that no tender of payment in silver money 'for a sum' exceeding 'forty shillings' shall be legal.'[u]

As to the impression, the stamping thereof is the unquestionable prerogative of the Crown: for though divers bishops and monasteries had formerly the privilege of coining money, yet, as Sir Matthew Hale observes,[v] this was usually done by special grant from the Crown, or by prescription which supposes one: and therefore was derived from, and not in [278] derogation of, the royal prerogative. Besides that they had only the profit of the coinage, and not the power of instituting either the impression or denomination; but had usually the stamp sent them from the exchequer.

[t] 2 Inst. 577.

[u] 'By 3 & 4 Will. IV. c. 98, a legal tender may be made in Bank of England notes, for all sums above five pounds.'

[v] 1 Hist. P. C. 191.

The denomination, or value for which the coin is to pass current, is likewise in the breast of the sovereign; and if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight, and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard[w] and called esterling or sterling metal; a name for which there are various reasons given,[x] but none of them entirely satisfactory. And of this sterling or esterling metal all the coin of the kingdom must be made by the statute 25 Edw. III. c. 13. So that the royal prerogative seemed not to extend to the debasing or enhancing the value of the coin below or above the sterling value:[y] though Sir Matthew Hale[z] appears to be of another opinion. The sovereign may also, by his proclamation, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments.[a] But this, I apprehend, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary.
[279] The sovereign may also, 'it is said,' at any time decry, or cry down, any coin of the kingdom, and make it no longer current;[b] 'but considering the frequent interference of parliament with reference to it, the regulation of the coinage cannot now, I apprehend, be referred simply to the prerogative.'

VI. Is head of the church.

VI. The sovereign is, lastly, considered by the laws of England as the head and supreme governor of the national Church.

To enter into the reasons upon which this prerogative is founded, is matter rather of divinity than of law. I shall therefore only observe that by statute 26 Henry VIII. c. 1 (reciting that the king's majesty justly and rightfully is and ought to be the supreme head of the Church of England; and so had been recognised by the clergy of this kingdom in their

[w] This standard has frequently varied. See M'Culloch's Com. Dict. '*Coins*.'

[x] Spelm Gloss. 203; Dufresne, iii. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlingi*, or Esterlings; as those Saxons were anciently called who inhabited that district of Germany now occupied by the Hanse-towns and their appendages; the earliest traders in modern Europe. (See Camden's Scotland, p. 11; Sir John Davis's Rep. 48.)

[y] 2 Inst. 577.

[z] 1 Hal. P. C. 194.

[a] 1 Hal. P. C. 197.

[b] 1 Hal. P. C. 197.

convocation), it is enacted, that the king shall be reputed the only supreme head of the Church of England, and shall have annexed to the imperial Crown of this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of supreme head of the Church appertaining. And another statute to the same purport was made, 1 Eliz. c. 1.

In virtue of this authority the king convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the Crown, long before the time of Henry VIII., as appears by the statute 8 Henry VI. c. 1, and the many authors, both lawyers and historians, vouched by Sir Edward Coke.[c] So that the statute 25 Hen. VIII. c. 19, which restrains the convocation from making or putting in execution any canons repugnant to the royal prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common law:[d] that part of it only being new, which makes the royal assent actually necessary to the validity of every canon. The convocation, or ecclesiastical synod in England, differs considerably in its constitution from the synods of other Christian kingdoms: these consisting wholly of bishops; whereas with us the convocation is the miniature of a parliament, wherein the archbishop presides with regal state; the upper house of bishops represent the House of Lords; and the lower house, composed of representatives of the several dioceses at large, and of each particular chapter therein, resembles the House of Commons with its knights of the shire and burgesses. This constitution is said to be owing to the policy of Edward I.: who thereby at one and the same time let in the inferior clergy to the privileges of framing ecclesiastical canons (which before they had not), and also introduced a method of taxing ecclesiastical benefices, by consent of convocation.[e]

The convocations.

[280]

From this prerogative, of being head of the Church, arises the sovereign's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments; which will more properly be considered when we come to treat of the clergy. I shall only here observe, that this is now done in consequence of the statute 25 Hen. VIII. c. 20. 'In the sovereign in

[c] 4 Inst. 322, 323.

[d] 12 Rep. 72.

[e] Gilb. Hist. of Exch. c. 4. Hallam's Const. Hist. v. iii. ch. 16.

council is also vested the power of giving effect to any scheme or recommendation of the Ecclesiastical Commissioners.[f] The order in council, for this purpose, when entered in the registry of the diocese, has after publication in the London Gazette, the force and effect of an Act of Parliament.'

As the head of the Church, the sovereign is likewise the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him from the sentence of every ecclesiastical judge; which right was restored to the Crown by statute 25 Hen. VIII. c. 19, as will more fully be shown hereafter, 'and is exercised by the sovereign in such manner as he is advised by the judicial committee of the Privy Council.'

[f] 'The powers and duties of these Commissioners may be thus stated:—In 1835 two commissions issued from the Crown, directing the persons named therein to consider the state of the several dioceses in England and Wales with reference to the amount of their revenues, and the more equal distribution of episcopal duties; and also to consider the state of the several cathedral and collegiate churches in England and Wales, with a view to the suggestion of such measures as might render them conducive to the efficiency of the Established Church; and further to devise the best mode of providing for the cure of souls with special reference to the residence of the clergy on their respective benefices. These commissioners made four reports, recommending various alterations (see 5 & 6 Will. IV. c. 30, and 6 & 7 Will. IV. c. 67), including the formation of new and the alteration of existing dioceses; and they also recommended, that commissioners should be appointed by parliament, for the purpose of preparing and laying before the sovereign in council such schemes as should appear to them, to be best adapted for carrying those recommendations into effect; and that the Crown should be empowered to make orders ratifying such schemes, and having the full force of law. The stat. 6 & 7 Will. IV. c. 77, was accordingly passed, appointing ecclesiastical commissioners, and making them a body corporate, and giving them the powers mentioned in the Act; these powers, however, being confined to carrying out the specified recommendations of the commissioners. The statute also contained certain temporary provisions, which have been continued by various subsequent Acts. The recommendations contained in the four reports of the original commissioners have been carried out, with certain modifications and amendments, to which the sanction of parliament was required and obtained (see 1 & 2 Vict. cc. 30, 106, 108; 2 & 3 Vict. cc. 9, 14; 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; 6 & 7 Vict. c. 77; 10 & 11 Vict. cc. 98, 108; 13 & 14 Vict. c. 41; 16 & 17 Vict. c. 50). The chief features of the alterations thus effected are the equalization of the territorial extent of the dioceses, the creation of the new sees of Ripon and Manchester, and the union of the sees of Gloucester and Bristol. The revenues of the sees have been also equalized, by augmenting the income of the smaller out of the revenues of the larger. Cathedral and collegiate bodies have also been regulated. The powers and constitution of the ecclesiastical commissioners have been amended by the stat. 3 & 4 Vict. c. 113, s. 78; and by the appointment of church estates commissioners, who are *ex officio* members of the ecclesiastical commission (see 13 & 14 Vict. c. 94; 14 & 15 Vict. c. 104; 19 & 20 Vict. c. 74); and, lastly, by the transfer of the powers of the church building commissioners to the ecclesiastical commissioners, whose functions will be more appropriately considered in a subsequent chapter, by the stat. 19 & 20 Vict. c. 55.'

CHAPTER VIII.

OF THE ROYAL REVENUE.

HAVING, in the preceding chapter, considered at large those branches of the sovereign's *prerogative*, which contribute to his royal dignity, and constitute the executive power of the government, we proceed now to examine his *fiscal* prerogatives, or such as regard his *revenue;* which the British constitution has vested in the royal person, in order to support his dignity and maintain his power: being a portion which each subject contributes of his property in order to secure the remainder. [281]

1. Ordinary revenue.

This revenue is either *ordinary* or *extraordinary*. The *ordinary* revenue is such as has either subsisted time out of mind in the Crown; or else has been granted by parliament, by way of purchase or exchange for such of the sovereign's inherent hereditary revenues as were found inconvenient to the subject.

When I say that it has existed time out of mind in the Crown, I do not mean that the sovereign is at present in the actual possession of the whole of this revenue. Much (nay the greatest part) of it is at this day in the hands of subjects, to whom it has been granted out from time to time by the kings of England, which has rendered the Crown in some measure dependent on the people for its ordinary support and subsistence. So that I must be obliged to recount, as part of the royal revenue, what lords of manors and other subjects frequently look upon to be their own absolute inherent rights; because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes. [282]

I. Custody of bishops' temporalities.

I. The first of the ordinary revenues of the Crown, which I shall take notice of, is of an *ecclesiastical kind* (as are also the three succeeding ones); viz., *the custody of the temporalities*

of bishops; by which are meant all the lay revenues, lands, and tenements (in which is included his barony) which belong to an archbishop's or bishop's see. And these, upon the vacancy of the bishopric, are immediately the right of the sovereign, as a consequence of his prerogative in Church matters; whereby he is considered as the founder of all archbishoprics and bishoprics, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the king had the custody of the temporalities of all such abbeys and priories as were of royal foundation (but not of those founded by subjects) on the death of the abbot or prior.[a] Another reason may also be given why the policy of the law has vested this custody in the Crown; because, as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the sovereign, not the temporalities themselves, but the *custody* of the temporalities, till such time as a successor is appointed, with power of taking to himself all the intermediate profits, without
[283] any account to the successor; and with the right of presenting (which the Crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation.[b] This revenue is of so high a nature, that it could not be granted out to a subject before, or even after, it accrued: but now, by the statute 1 Edw. III. st. 4, c. 4 & 5, the sovereign may, after the vacancy, lease the temporalities to the dean and chapter; saving to himself all advowsons, escheats, and the like. Our ancient kings, and particularly William Rufus, were not only remarkable for keeping the bishoprics a long time vacant, for the sake of enjoying the temporalities, but also committed horrible waste on the woods and other parts of the estate; and, to crown all, would never, when the see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, King Henry the First[c] granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take anything from the domains of the Church, till the successor was installed. And it was made one of the articles of the Great Charter,[d] that no waste should

[a] 2 Inst. 15.
[b] Stat. 17 Edw. II. st. 1, c. 14; F. N. B. 32.
[c] Matt. Paris.
[d] 9 Hen. III. c. 5.

be committed in the temporalities of bishoprics, neither should the custody of them be sold. The same is ordained by the statute of Westminster the first;[e] and the statute of 14 Edw. III. st. 4, c. 4 (which permits, as we have seen, a lease to the dean and chapter), is still more explicit in prohibiting the other exactions. It was also a frequent abuse that the sovereign would, for trifling or no causes, seize the temporalities of bishops, even during their lives, into his own hands: but this is guarded against by statute 1 Edw. III. st. 2, c. 2.

This revenue, which was formerly very considerable, is now, by a customary indulgence, almost reduced to nothing: for at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalities [284] quite entire and untouched from the Crown; and at the same time does homage to his sovereign; and then, and not sooner, he has a fee-simple in his bishopric, and may maintain an action for the profits.[f]

II. The sovereign is entitled to a *corody*, as the law calls it, II. Corodies. out of every bishopric, that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice. This is also in the nature of an acknowledgment to the king, as founder of the see, since he had formerly the same corody or pension from every abbey or priory of royal foundation. It is, I apprehend, now fallen into total disuse; though Sir Matthew Hale says, that it is due of common right, and that no prescription will discharge it.[g]

III. The sovereign also (as was formerly observed) is entitled to all the *tithes* 'or the rent-charge now substituted in lieu thereof,' *arising in extra-parochial places:*[h] though perhaps it may be doubted how far this article, as well as the last, can be properly reckoned a part of the royal revenue: since a corody supports only his chaplains, and these extra-parochial tithes are held under an implied trust, that he will distribute them for the good of the clergy in general. III. Tithes extra-parochial.

IV. The next branch consists in the *first-fruits, and tenths,* IV. First-fruits and tenths.

[e] 3 Edw. I. c. 21.
[f] Co. Litt. 67, 341.
[g] F. N. B. 230.
[h] 2 Inst. 647; 6&7 Will. IV. c. 71, s. 13.

of all spiritual preferments in the kingdom; both of which I shall consider together.

These were originally a part of the papal usurpations over the clergy of this kingdom; first introduced by Pandulph, the Pope's legate, during the reigns of King John and Henry the Third, in the see of Norwich; and afterwards attempted to be made universal by the Popes Clement V. and John XXII., about the beginning of the fourteenth century. The first-fruits, *primatœ* or *annates*, were the first year's whole profits
[285] of the spiritual preferment, according to a rate or *valor* made under the direction of Pope Innocent IV. by Walter, Bishop of Norwich, in 38 Hen. III., and afterwards advanced in value by commission from Pope Nicholas 'IV.,' A. D. 1292, 20 Edw. I.:[i] which valuation of Pope Nicholas is still preserved in the Exchequer.[j] The tenths, or *decimœ*, were the tenth part of the annual profit of each living by the same valuation, which was also claimed by the Holy See, under no better pretence than a strange misapplication of that precept of the Levitical law, which directs, that the Levites "should "offer the tenth part of their tithes as a heave-offering to the "Lord, and give it to Aaron the *high* priest." But this claim of the Pope met with a vigorous resistance from the English Parliament; and a variety of Acts were passed to prevent and restrain it, particularly the statute 6 Hen. IV. c. 1, which calls it a horrible mischief, and damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept it on foot: sometimes more secretly, sometimes more openly and avowedly: so that in the reign of Henry VIII., it

[i] F. N. B. 176.

[j] 3 Inst. 154. 'This valuation forms one of the works published by the Record Commissioners. Mr. Justice Coleridge has stated the historical origin of this branch of the royal revenue more exactly:—In 1253, Pope Innocent IV. granted all the first-fruits and tenths to Henry III. for three years, which occasioned a taxation in the following year, sometimes called the Norwich taxation, and sometimes Innocent's valuation. In 1288, Nicholas IV. granted the tenths to Edward I. for six years, and a new valuation was commenced in the same year by the king's precept, which valuation was, so far as it extended over the province of Canterbury, finished in 1291, and as to York also in the following year; the whole being under the direction of John Bishop of Winton, and Oliver Bishop of Lincoln. In 1318, a third taxation, entitled *Nova Taxatio*, was made, but this only extended over some part of the province of York. It became necessary chiefly in consequence of the Scottish invasion of the border counties, which rendered the clergy of those districts unable to pay tenths and first-fruits according to the higher valuation; and was made by virtue of royal mandate directed to the Bishop of Carlisle.' (Coleridge's Blackst.)

was computed that in the compass of fifty years 800,000 ducats had been sent to Rome for first-fruits only. And, as the clergy expressed this willingness to contribute so much of their income to the head of the church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the Church of England) to annex this revenue to the Crown, which was done by statute 26 Hen. VIII. c. 3 (confirmed by statute 1 Eliz. c. 4), and a new *Valor Beneficiorum* was then made, 'and is that commonly called the *King's Books*,' by which the clergy are at present rated.[k]

By these last-mentioned statutes all vicarages under ten pounds a-year, and all rectories under ten marks, are discharged from the payment of first-fruits: and if, in such livings as continue chargeable with this payment, the incumbent lives but half a year, he shall pay only one quarter of his first-fruits; if but one whole year, then half of them; if a year and a half three-quarters; and if two years then the whole; and not otherwise. Likewise by the statute 27 Hen. VIII. [286] c. 8, no tenths are to be paid for the first year, for then the first-fruits are due: and by other statutes of Queen Anne, in the fifth and sixth years of her reign, if a benefice be under fifty pounds *per annum* clear yearly value, it shall be discharged from the payment of first-fruits and tenths.

Thus the richer clergy, being, by the criminal bigotry of their popish predecessors, subjected at first to a foreign exaction, were afterwards, when that yoke was shaken off, liable to a like misapplication of their revenues, through the rapacious disposition of the then reigning monarch: till at length the piety of Queen Anne restored to the Church what had been thus indirectly taken from it. Thus she did, not by remitting the tenths and first-fruits entirely; but, in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 Ann. c. 11, whereby all the revenue of first-fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings. This is usually

[k] A transcript is given in Ecton's Thesaurus and Bacon's Liber Regis. See the reports of the Commissioners appointed to inquire into the Ecclesiastical Revenues (1831) as to the present value of the church property.

called *Queen Anne's Bounty;* which has been still farther regulated by subsequent statutes.[1]

V. Profits of demesne lands.

V. The next branch of the ordinary revenue of the sovereign (which, as well as the subsequent branches, is of a *lay* or temporal nature) consists in the *rents and profits of the demesne lands of the Crown.* These demesne lands, *terræ dominicales regis,* being either the share reserved to the Crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were anciently very large and extensive; comprising divers manors, honours, and lordships; the tenants of which had very peculiar privileges, as will be shown in the second book of these Commentaries, when we speak of the tenure in ancient demesne. At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the Parliament frequently to interpose; and
[287] particularly after King William III. had greatly impoverished the Crown, an Act passed,[m] whereby all future grants or leases from the Crown for any longer term than thirty-one years or three lives are declared to be void; except with regard to houses which may be granted for fifty years. And no reversionary lease can be made, so as to exceed together with the estate in being, the same term of three lives or thirty-one years; that is, where there is a subsisting lease, of which there are twenty years still to come, the Crown cannot grant a future interest, to commence after the expiration of the former, for any longer term than eleven years. The tenant must also be made liable to be punished for committing waste; and the usual rent must be reserved, or, where there has usually been no rent, one-third of the clear yearly value.[n] The misfortune is, that this Act was made too late, after almost every valuable possession of the Crown had been granted away. 'The management of the royal property is now, by the statute 14 & 15 Vict.

[1] 5 Ann. c. 24; 6 Ann. c. 27; 1 Geo. I. st. 2, c. 10; 3 Geo. I. c. 10. 'The offices of first-fruits, tenths, and Queen Anne's bounty, are consolidated and regulated by the statute 1 & 2 Vict. c. 20; and many attempts have since been made to place the administration of this fund on a proper footing. See 1 & 2 Vict. cc. 106 & 107, s. 10; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20; 4 & 5 Vict. c. 39; and 6 & 7 Vict. c. 37.'

[m] 1 Ann. st. 1, c. 7; 'See now 1 & 2 Vict. c. 95, s. 4.'

[n] In like manner, by the civil law, the inheritance or *fundi patrimoniales* of the imperial crown could not be alienated, but only let to farm. (Cod. l. 11, t. 61.)

c. 42, vested in certain commissioners, styled "Commissioners of Her Majesty's Woods, Forests,' and Land Revenues;" [o] but that part of the demesnes of the Crown, which consists of the parks and places to which the public has access,[p] is managed by the commissioners styled Commissioners of Her Majesty's Works and Public Buildings.'

VI. Profits of military tenures.

VI. Hither might have been referred the advantages which used to arise to the sovereign from the *profits of his military tenures*, to which most lands in the kingdom were subject, till the statute 12 Car. II. c. 24, which in great measure abolished them all: the explanation of the nature of which tenures must be postponed to the second book of these Commentaries. Hither also might have been referred the profitable prerogative of purveyance and pre-emption: which was a right enjoyed by the Crown of buying up provisions and other necessaries, by the intervention of the royal purveyors, for the use of the royal household, at an appraised valuation in preference to all others, and even without consent of the owner: and also of forcibly impressing the carriages and horses of the subject, to do the sovereign's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. A prero- [288] gative which prevailed pretty generally throughout Europe during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times the king's household (as well as those of inferior lords) were supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use.[q] And this answered all purposes, in those ages of simplicity, so long as the king's court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done), it was found necessary to send purveyors beforehand, to get together a sufficient quantity of provisions and other necessaries for the household; and, lest the unusual demand should

[o] 'The Crown may appoint a Surveyor-general in lieu of the Commissioners of Woods, Forests, and Land Revenues, 15 & 16 Vict. c. 62.'

[p] As to the parks in London, see 14 & 15 Vict. cc. 42, 46, & 77; and 15 & 16 Vict. c. 29.

[q] 4 Inst. 273.

raise them to an exorbitant price, the powers before mentioned were vested in these purveyors; who, in process of time, very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the Crown; ready money in open market (when the royal residence was more permanent, and specie began to be plenty) being found upon experience to be the best proveditor of any. Having fallen into disuse during the suspension of monarchy, King Charles at his restoration consented, by the same statute (12 Car. II. c. 24), to resign entirely these branches of his revenue and power; and the Parliament, in part of recompense, settled on him, his heirs and successors for ever, the hereditary excise of fifteen pence *per* barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. So that this hereditary excise, the nature of which shall be farther explained in the subsequent part of this chapter, now forms the sixth branch of the sovereign's ordinary revenue.

VII. Wine licenses.

[289]

VII. A seventh branch might also be computed to have arisen from *wine licenses*; or the rents payable to the Crown by such persons as are licensed to sell wine by retail throughout England, except in a few privileged places. These were first settled on the Crown by the statute 12 Car. II. c. 25, and together with the hereditary excise, made up the equivalent in value for the loss sustained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance: but this revenue was abolished by the statute 30 Geo. II. c. 19, and an annual sum of upwards of 7000*l.* *per annum*, issuing out of the stamp duties imposed on wine licenses, was settled on the Crown in its stead.

VIII. Profits of forests.

VIII. An eighth branch of the ordinary revenue of the sovereign is usually reckoned to consist in the profits arising from his forests. Forests are waste grounds belonging to the Crown, replenished with all manner of beasts of chase or venery; which are under the royal protection, for the sake of his royal recreation and delight: and, to that end, and for preservation of the game, there are particular laws, privileges, courts, and offices belonging to the forests; all which will be, in their turns, explained in the subsequent books of these Commentaries. What we are now to consider are only the

profits arising to the Crown from hence, which consist principally in amercements or fines levied for offences against the forest-laws. But as few, if any, courts of this kind for levying amercements[r] have been held since 1632 (8 Car. I.), and as from the accounts given of the proceedings in that court by our histories and law-books,[s] nobody would now wish to see them again revived, it is needless (at least in this place) to pursue this inquiry any farther.

IX. Profits of courts of law.

IX. The *profits* arising from the sovereign's *ordinary courts of justice* make a ninth branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances, and amercements levied upon defaulters; but [290] also in certain fees due to the Crown in a variety of legal matters, as, for setting the great seal to charters, original writs, and other forensic proceedings, and formerly for permitting fines to be levied of land in order to bar entails, or otherwise to insure their title. As none of these can be done without the immediate intervention of the sovereign, by himself or his officers, the law allows him certain perquisites and profits, as a recompense for the trouble he undertakes for the public. These, in process of time, were almost all granted out to private persons,[t] or else appropriated to certain particular uses: so that, though our law proceedings are still loaded with their payment, very little of them is now returned into the Exchequer; for a part of whose royal maintenance they were originally intended. All future grants of them, however, by the statute 1 Ann. st. 2, c. 7, are to endure for no longer time than the prince's life who grants them, 'and as the custom of making such grants has fallen into desuetude, there are not many now outstanding.'

X. Mines of silver and gold.

X. A tenth branch of the royal revenue, the right to *mines*, has its origin from the sovereign's prerogative of coinage, in order to supply him with materials; and therefore those mines, which are properly royal, and to which the Crown is entitled when found, are only those of silver and gold.[u] By the old

[r] Roger North, in his life of Lord Keeper North (43, 44), mentions an eyre, or *iter*, to have been held south of Trent soon after the Restoration; but I have met with no report of its proceedings.

[s] 1 Jones, 267-298.

[t] 'The Earl of Ellenborough has 7700*l.* per annum, as compensation for his office of chief clerk of the Court of Queen's Bench.'

[u] 2 Inst. 577.

common law, if gold or silver be found in mines of base metal, according to the opinion of some the whole was a royal mine, and belonged to the Crown; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal.[v] But now by the statutes 1 W. & M. st. 1, c. 30, 5 W. & M. c. 6, 'and 55 Geo. III. c. 134,' this difference is made immaterial; it being enacted, that no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities; but that the king, or persons claiming royal mines under his authority, may have the ore (other than tin ore in the counties of Devon and Cornwall), paying for the same a price stated in the Act. This was an extremely reasonable law: for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the sovereign depart from the just rights of his revenue, since he may have all the precious metals contained in the ore, paying no more for it than the value of the base metal which it is supposed to be; to which base metal the land-owner is by reason and law entitled.

XI. Royal fish.

XI. A branch of the sovereign's ordinary revenue, said to be grounded on the consideration of his guarding and protecting the seas from pirates and robbers, is the right to *royal fish*, which are whale and sturgeon: and these, when either thrown ashore, or caught near the coast, are the property of the Crown, on account[w] of their superior excellence. Indeed our ancestors seem to have entertained a very high notion of the importance of this right; it being the prerogatives of the Kings of Denmark and the Dukes of Normandy;[x] and from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute *de prærogativâ regis;*[y] and the most ancient treatises of law now extant make mention of it;[z] though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter.

[v] Plowd. 336.
[w] Plowd. 315.
[x] Stiernh. de Jure Sueonum. l. 2, c. 8; Gr. Coustum. cap. 17.
[y] 17 Edw. II. c. 11.
[z] Bracton, l. 3, c. 3; Britton, c. 17; Fleta, l. 1, c. 45, 46; Memorand. Scacch'. H. 24 Edw. I. 37, prefixed to Maynard's edition of the Year-book of Edward II.

XII. Shipwrecks.

XII. Another maritime revenue, and founded partly upon the same reason, is that of *shipwrecks:* which are also declared [291] to be the sovereign's property by the same prerogative statute 17 Edw. II. c. 11, and were so, long before, at the common law. It is worthy observation how greatly the law of wrecks has been altered, and the rigour of it gradually softened in favour of the distressed proprietors. Wreck, by the ancient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the king: for it was held, that, by the loss of the ship, all property was gone out of the original owner.[a] But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first ordained by King Henry I. that if any person escaped alive out of the ship it should be no wreck;[b] and afterwards King Henry II., by his charter,[c] declared, that if on the coasts of either England, Poictou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive; the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by King Richard the First, who, in the second year of his reign,[d] not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped "*omnes res suas liberas et quietas haberet,*" but also, that, if he perished, his children, or in default of them his brethren and sisters, should retain the property; and, in default of brother and sister, then the goods should remain to the king.[e] And the law, as laid down by Bracton in the reign of Henry III., seems still [292] to have improved in its equity. For then, if not only a dog (for instance) escaped, by which the owner might be discovered, but if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck.[f]

[a] Dr. & St. d. 2, c. 51.

[b] Spelm. Cod. apud Wilkins, 305.

[c] 26 May, A.D. 1174; 1 Rym. Fœd. 36.

[d] Rog. Hoved. in Ric. I.

[e] In like manner, Constantine the Great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or *fiscus*, restrained it by an edict (Cod. 11, 5, 1), and ordered them to remain to the owners, adding this humane expostulation, "*Quod enim jus habet fiscus in alienâ calamitate, ut de re tam luctuosâ compendium sectetur?*"

[f] Bract. l. 3, c. 3.

And this is certainly most agreeable to reason; the rational claim of the Crown, being only founded on this, that the true owner cannot be ascertained. Afterwards, in the statute of Westminster the first,[g] the time of limitation of claims, given by the charter of Henry II. is extended to a year and a day, according to the usage of Normandy:[h] and it enacts, that if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for examples;[i] for it is now held,[j] that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be bound to keep the goods a year and a day (as in France, for one year, agreeably to the maritime laws of Oleron,[k] and in Holland for a year and a half), that if any man can prove a property in them, either in his own right or by right of representation,[l] they shall be restored to him without delay; but if no such property be proved within that time, they then shall be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead.[m] This revenue of wrecks is frequently granted out to lords of manors, as a royal franchise; and if any one be thus entitled to wrecks in his own land, and the goods of the Crown are wrecked thereon, the sovereign may claim them at any time, even after the year and day.[n]

It is to be observed that, in order to constitute a legal *wreck*, the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth
[293] appellations of *jetsam, flotsam,* and *ligan.* Jetsam is where goods are cast into the sea, and there sink and remain under water: flotsam is where they continue swimming on the surface of the waves: ligan is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again.[o] These also belong to the Crown, if no owner appears to claim them; but if any owner appears, he is entitled to recover the possession.

[g] 3 Edw. I. c. 4.

[h] Gr. Coustum. c. 17.

[i] Flet. l. 1, c. 44; 2 Inst. 167; 5 Rep. 107.

[j] *Hamilton* v. *Davies*, 5 Burr. 2732.

[k] § 28.

[l] 2 Inst. 168.

[m] Plowd. 465.

[n] 2 Inst. 168; Bro. Abr. tit. *Wreck.*

[o] *Constable's* case; 5 Rep. 106.

For even if they be cast overboard, without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property:[p] much less can things *ligan* be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the royal grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass.[q]

Wrecks, in their legal acceptation, are at present not very frequent, for if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And in order to preserve this property entire for him, and if possible to prevent wrecks at all, our laws have made many very humane regulations; in a spirit quite opposite to those savage laws, which formerly prevailed in all the northern regions of Europe, permitting the inhabitants to seize on whatever they could get as lawful prize: or as an author of their own expresses it, "*in naufragorum miseriâ et calamitate tanquam vultures ad prædam currere.*"[r] For by the statute of 27 Edw. III. c. 13, if any ship be lost on the shore, and the goods come to land (which cannot, says the statute, be called wreck), they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is entitled *salvage*. Also by [294] the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution.[s] And 'now by "the Merchant Shipping Act, 1854," 17 & 18 Vict. c. 5, (analogous provisions having been previously made' by statute 12 Ann. st. 2, c. 18, 'and various subsequent statutes,' in order to assist the distressed, and prevent the scandalous illegal practices on some of our sea-coasts,) 'power is given to officers appointed by the Board of Trade, termed "Receivers of Wrecks," to summon such number of men as they think necessary to

Salvage.

[p] *Quæ enim res in tempestate, levandæ navis causâ, ejiciuntur, hæ dominorum permanent. Quia palam est, eas non eo animo ejici, quod quis habere nolit.* (Inst. 2, 1, § 48.)

[q] 5 Rep. 108.

[r] Stiernh. de Jure Sueon. l. 3, c. 5.

[s] F. N. B. 112.

assist them, and also to demand the use of waggons, carts, and horses, with a view to the preservation of ships stranded or in distress, and their cargoes, and the lives of persons belonging to them, under a penalty, in persons refusing, of 100*l.*;' and, in case of assistance given, salvage shall be paid by the owners, to be assessed, 'in ordinary cases, and when the sum claimed does not exceed 200*l.*, in case of disagreement,' by two neighbouring justices; 'and when the sum claimed exceeds that amount, the dispute, unless the parties consent to its being settled by the justices, is to be decided by the High Court of Admiralty.' All persons that secrete any goods 'or cargo' washed on shore, whether they be the owners or not, incur a penalty not exceeding 100*l.*; while by other statutes, whoever plunders or steals any part of any distressed or wrecked ship, or any of its cargo, is liable to transportation or penal servitude, or imprisonment as a felon.[t]' Lastly, by the statute '7 Will. IV., and 1 Vict. c. 89, whoever exhibits any false light or signal, with the intent to bring any ship or vessel into danger, or maliciously does anything tending to the immediate loss or destruction of any vessel in distress, is punishable with death.'[u] Many other salutary regulations are made for the more effectually preserving ships of any nation in distress.

XIII. Treasure-trove.

XIII. To the same origin may in part be referred the [295] revenue of treasure-trove (derived from the French word, *trover*, to find), called in Latin *thesaurus inventus*, which is where any money, or coin, gold, silver, plate, or bullion, is found hidden *in* the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the Crown: but if he that hid it be known, or afterwards found out, the owner, and not the sovereign, is entitled to it.[v] Also [296] if it be found in the sea, or *upon* the earth, it does not belong to the king, but the finder, if no owner appears.[w] So that it

[t] 7 Will. IV. & 1 Vict. c. 87, s. 8.

[u] By the civil law, to destroy persons shipwrecked, or prevent their saving the ship, is capital. And to steal even a plank from a vessel in distress, or wrecked, makes the party liable to answer for the whole ship and cargo. (Ff. 47, 9, 3.) The laws also of the Visigoths, and the most early Neapolitan constitutions, punished with the utmost severity all those who neglected to assist any ship in distress, or plundered any goods cast on shore. (Lindenbrog Cod. LL. antiq. 146, 715.)

[v] 3 Inst. 132; Dalt. of Sheriffs, c. 16.

[w] Britt. c. 17; Finch. 177. In *Armory* v. *Delamirie* (Str. 505), a chimney-sweeper's boy recovered the value of the finest diamond, which would fit the socket of a jewel which

seems it is the *hiding*, and not the *abandoning* of it, that gives the Crown a property: Bracton defining it, in the words of the civilians, to be "*vetus depositio pecuniæ.*" This difference clearly arises from the different intentions which the law implies in the owner. A man, that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again, when he sees occasion: and if he dies, and the secret also dies with him, the law gives it to the sovereign in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it: and therefore it belongs as in a state of nature, to the first occupant or finder; unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property.

Formerly all treasure-trove belonged to the finder;[x] as was also the rule of the civil law.[y] Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the Crown: which part was assigned to be all *hidden* treasure; such as is *casually lost* and unclaimed, and also such as is *designedly abandoned*, still remaining the right of the fortunate finder. And that the prince shall be entitled to this *hidden* treasure is now grown to be, according to Grotius,[z] "*jus commune et quasi gentium:*" for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution, than at present. When the Romans, and other inhabitants of the respective countries which composed their empire, were driven out by the northern nations, they concealed their money under ground; with a view of resorting to it again when the heat of the irruption should be over, and [297]

the boy had found in the street, from a goldsmith who detained from him the diamond, which had been in the socket, when the jewel was handed to the goldsmith for examination, and to ascertain what it was. See 1 Smith's L. C. 4th ed. 256.

[x] Bracton, l. 3, c. 3; 3 Inst. 133.

[y] Ff. 41, 1, 31.

[z] De Jur. B. et P. l. 2, c. 8, § 7.

the invaders driven back to their deserts. But, as this never happened, the treasures were never claimed; and on the death of the owners the secret also died along with them. The conquering generals, being aware of the value of these hidden mines, made it highly penal to secrete them from the public service. In England therefore, as among the feudists,[a] the punishment of such as concealed from the Crown the finding of hidden treasure was formerly no less than death; but now it is only fine and imprisonment.[b]

IV. Waifs.

XIV. Waifs, *bona waviata*, are goods stolen, and waived or thrown away by the thief in his flight, for fear of being apprehended. These are given to the Crown by the law, as a punishment upon the owner, for not himself pursuing the felon, and taking away his goods from him.[c] And therefore if the party robbed do his diligence immediately to follow and apprehend the thief (which is called making *fresh suit*), or do convict him afterwards, or procure evidence to convict him, he shall have his goods again; for waived goods do not belong to the sovereign till seized by somebody for his use; and if the party robbed can seize them first, though at the distance of twenty years, the Crown shall never have them.[d] If the goods are hid by the thief, or left anywhere by him, so that he had not them about him when he fled, and therefore did not throw them away in his flight; these also are not *bona waviata*, but the owner may have them again when he pleases;[e] and the goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs;[f] the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language.

XV Estrays.

[298]

XV. Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knows the owner of them, in which case the law gives them to the sovereign as the general owner, and lord paramount of the soil, in recom-

[a] Glanv. l. 1, c. 2; Crag. 1, 16, 40.
[b] 3 Inst. 133.
[c] Cro. Eliz. 694.
[d] Finch, L. 212.
[e] *Constable's* case, 5 Rep. 109.
[f] Fitzh. Ab. t. *Estray*, 1; 3 Bulstr. 19.

pense for the damage which they may have done therein: and they now most commonly belong to the lord of the manor by special grant from the Crown. But, in order to vest an absolute property in the sovereign, or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found; and then, if no man claims them, after proclamation and a year and a day passed, they belong to the sovereign or his substitute without redemption;[g] even though the owner were a minor, or under any other legal incapacity.[h] A provision similar to which obtained in the old Gothic constitution, with regard to all things that were found, which were to be thrice proclaimed; *primum coram comitibus et viatoribus obviis, deinde in proximâ villâ vel pago, postremo coram ecclesiâ vel judicio:* and the space of a year was allowed for the owner to reclaim his property.[i] If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them.[j] The Crown or lord has no property till the year and day passed: for if a lord keeps an estray three quarters of a year, and within the year it strays again, and another lord gets it, the other lord cannot take it again.[k] Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle; and so Fleta[l] defines them, *pecus vagans, quod nullus petit, sequitur vel advocat.* For animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl; whence they are said to be royal fowl.[m] The reason of which distinction seems to be, that cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he that takes an estray [299] is bound, so long as he keeps it, to find it in provisions, and

[g] Mirr. c. 3, § 19. *Brownlow* v. *Lambert*, Cro. Eliz. 716.

[h] *Constable's* case, 5 Rep. 108; Bro. Abr. tit. *Estray*.

[i] Stiernh. de Jure Gothor. l. 3, c. 5.

[j] Dalt. Sh. 79; a rule which does not apply when any one takes care of another's property, not being entitled to it as an estray. (*Binstead* v. *Buck*, 2 Wm. Bl. 1117; *Nicholson* v. *Chapman*, 2 Hen. Bl. 254.)

[k] Finch, L. 177.

[l] L. 1, c. 43.

[m] Case of *Swans*, 7 Rep. 17.

preserve it from damage; and may not use it by way of labour, but is liable to an action for so doing.[n] Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit of the animal.[o]

Besides the particular reasons before given why the king should have the several revenues of *royal fish, shipwrecks, treasure-trove, waifs,* and *estrays,* there is also one general reason which holds for them all: and that is, because they are *bona vacantia,* or goods in which no one else can claim a property. And therefore by the law of nature they belonged to the first occupant or finder; and so continued under the imperial law. But, in settling the modern constitutions of most of the governments of Europe, it was thought proper (to prevent that strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burdensome to individuals) that these rights should be annexed to the supreme power by the positive laws of the state. And so it came to pass that, as Bracton expresses it,[p] *hæc quæ nullius in bonis sunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.*

XVI. Forfeitures of goods for offences

XVI. The next branch of the ordinary revenue of the Crown consists in *forfeitures of lands and goods* for offences; *bona confiscata,* as they are called by the civilians, because they belonged to the *fiscus* or imperial treasury; or as our lawyers term them, *forisfacta;* that is, such whereof the property is gone away, or departed from the owner. The true reason and only substantial ground of any forfeiture for crimes consist in this—that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If
[300] therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offence of an atrocious

[n] 1 Roll. Abr. 878. [o] Cro. Jac. 148; Noy. 119. [p] L. 1, c. 12.

kind, the laws of England have exacted a total confiscation of the moveables or personal estate; and in many cases a perpetual, in others only a temporary loss of the offender's immoveables or landed property; and have vested them both in the sovereign, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides. The particulars of these forfeitures will be more properly recited when we treat of crimes and misdemeanors. I therefore only mention them here for the sake of regularity, as a part of the *census regalis;* and shall postpone for the present the farther consideration of all forfeitures, excepting one species only, which arose from the misfortune rather than the crime of the owner, and was called a *deodand.*

By this was meant whatever personal chattel was the immediate occasion of the death of any reasonable creature: which was forfeited to the Crown, to be applied to pious uses, and distributed in alms by his high almoner; though formerly destined to a more superstitious purpose. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy Church: in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand was due where an infant under the age of discretion was killed by a fall *from* a cart, or horse, or the like, not being in motion; whereas, if an adult person fell from thence and was killed, the thing was certainly forfeited. For the reason given by Sir Matthew Hale seems [301] to be very inadequate, viz. because an infant is not able to take care of himself; for why should the owner save his forfeiture on account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident of mischief? The true ground of this rule seems rather to have been, that the child, by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses: but every adult, who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.

Deodands.

Thus stood the law if a person were killed by a fall from a

thing standing still. But if a horse, or ox, or other animal, of his own motion, killed as well an infant as an adult, or if a cart ran over him, they were in either case forfeited as deodands;[q] which was grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture. A like punishment is in like cases inflicted by the Mosaic law; "if an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten." And, among the Athenians, whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic.[r] Where a thing not in motion was the occasion of a man's death, that part only which was the immediate cause was forfeited; as if a man was climbing up the wheel of a cart, and was killed by falling from it, the wheel alone was a deodand: but, wherever the thing was in motion, not only that part which immediately gave the wound (as the wheel, which run over his body) but all things which moved with it, and helped to make the wound more dangerous (as the cart and
[302] loading, which increased the pressure of the wheel) were forfeited. It mattered not whether the owner were concerned in the killing or not: for, if a man killed another with my sword, the sword was forfeited as an accursed thing. And therefore, in all indictments for homicide, the instrument of death and the value were formerly presented and found by the grand jury (as, that the stroke was given by a certain penknife, value sixpence) that the sovereign or his grantee might claim the deodand: for it was no deodand, unless it were presented as such by a jury of twelve men. No deodands were due for accidents happening upon the high seas, that being out of the jurisdiction of the common law: but if a man fell from a boat or ship in fresh water, and was drowned, it was said, that the vessel and cargo were, in strictness of law, a deodand. But juries very frequently took upon themselves to mitigate those forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. And in such cases, although the finding by the jury was hardly war-

[q] *Omnia, quæ movent ad mortem, sunt Deo danda.* (Bracton, l. 3, c. 5.)

[r] Æschin. con. Ctesiph. Thus, too, by our ancient law, a well in which a person was drowned was ordered to be filled up, under the inspection of the coroner. (Flet. l. 1, c. 25, § 10; Fitzh. Abr. t. *Corone*, 416.)

rantable by law, the Court of King's Bench generally refused to interfere on behalf of the lord of the franchise, to assist so inequitable a claim. 'Juries and judges having thus alike condemned the practice, as repugnant to the feelings of mankind, deodands were formally abolished by the statute 9 & 10 Vict. c. 62.'

XVII. Escheats.

XVII. Another branch of the ordinary revenue of the Crown arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the sovereign, who is esteemed, in the eye of the law, the original proprietor of all the lands of the kingdom. But the discussion of this topic more properly belongs to the second book of these Commentaries, wherein we shall particularly consider the manner in which lands may be acquired or lost by escheat.

XVIII. Custody of idiots and lunatics.

XVIII. I proceed, therefore, to the eighteenth and last branch of the sovereign's ordinary revenue, which consists in the custody of idiots, from whence we shall be naturally led to consider also the custody of lunatics. [303]

An idiot, or natural fool, is one that has had no understanding from his nativity; and therefore is by law presumed never likely to attain any. For which reason the custody of him and of his lands was formerly vested in the lord of the fee,[s] but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the sovereign, as the general conservator of his people; in order to prevent the idiot from wasting his estate; and reducing himself and his heirs to poverty and distress.[t] This prerogative of the Crown is declared in Parliament by statute 17 Edw. II. c. 9, which directs (in affirmance of the common law)[u] that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and after the death of such idiots he shall render the estate to the heirs: in order to prevent such idiots from aliening their lands, and their heirs from being disinherited.

[s] Flet. l. 1, c. 11, § 10; Dyer, 302; Hutt. 17; Noy. 27.

[t] F. N. B. 232.

[u] 4 Rep. 126; Memorand' Scacc' 20 Edw. I. (prefixed to Maynard's Yearbook of Edw. II.), fol. 20, 24.

[304] By the old common law there is a writ *de idiotâ inquirendo*, to inquire whether a man be an idiot or not:[v] which must be tried by a jury of twelve men: and, if they find him *purus idiota*, the profits of his lands and the custody of his person may be granted by the Crown to some subject who has interest enough to obtain them.[w] This branch of the revenue has long been considered as a hardship upon private families; and so long ago as in the 8 Jac. I., it was under the consideration of Parliament, to vest this custody in the relations of the party, and to settle an equivalent on the Crown in lieu of it; it being then proposed to share the same fate with the slavery of the feudal tenures, which has been since abolished.[x] Yet few instances can be given of the oppressive exertion of it, since it seldom happens that a jury finds a man an idiot *a nativitate*, but only *non compos mentis* from some particular time; which has an operation very different in point of law.

A man is not an idiot,[y] if he has any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law in the same state with an idiot;[z] he being 'presumed' incapable of any understanding, as wanting all those senses which furnish the human mind with ideas, 'until the presumption be rebutted by evidence of capacity.'[a]

Lunatics. A lunatic, or *non compos mentis*, is one who has had understanding, but by disease, grief, or other accident, has lost the use of his reason.[b] A lunatic is indeed properly one that has had lucid intervals: sometimes enjoying his senses, and sometimes not, and that frequently depending, 'as many have imagined,' upon the changes of the moon. But under the general name of *non compos mentis* (which Sir Edward Coke says is the most legal name)[c] are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so;[d] or such, in short, as are judged by the Court of Chancery incapable of conducting their own affairs. To these

[v] F. N. B. 232.

[w] This power, though of late very rarely exerted, is still alluded to in common speech, by that usual expression of *begging* a man for a fool.

[x] 4 Inst. 203; Com. Journ. 1610.

[y] F. N. B. 233.

[z] Co. Litt. 42; Fleta, l. 6, c. 40.

[a] Chitty's Med. Juris. l. 301, 345.

[b] *Idiota a casu et infirmitate.* (Mem. Scacch. 20 Edw. I. (in Maynard's Year-book of Edw. II.) 20.)

[c] 1 Inst. 246.

[d] *Yong* v. *Sant*, Dyer, 56 a.

also, as well as idiots, the sovereign is guardian, but to a very different purpose. For the law always imagines, that these accidental misfortunes may be removed; and therefore only constitutes the Crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II. c. 10, that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind; and the king shall take nothing to his own use; and if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.

On the first attack of lunacy or other occasional insanity, while there may be hopes of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations; and the legislature, to prevent all abuses incident to such private custody, has thought proper to interpose its authority from time to time for 'licensing,' regulating, 'and visiting' private 'asylums,[e] as well as for the care and maintenance of pauper lunatics in county asylums.[f] In many cases, however, where the insanity is of a permanent character, it becomes necessary, in reference to the property of the lunatic, and its care and management, to have the fact of lunacy legally determined by law.'

The Lord Chancellor, to whom, by special authority from the sovereign, the custody of lunatics and idiots is intrusted,[g] upon petition or information, grants a commission, 'special [306]
or general,' in nature of the writ *de idiotâ* 'or *de lunatico*' *inquirendo*, 'directed to the masters in lunacy' to inquire into the party's state of mind; and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee.[h] However, to prevent sinister practices, the next heir is seldom permitted to be this committee of the

[e] 8 & 9 Vict c. 100.

[f] See the Lunatic Asylums Act 1853, 16 & 17 Vict. c. 97.

[g] 3 P. Wms. 108.

[h] See the Lunacy Regulation Act 1853, 16 & 17 Vict. c. 70.

person; because it is his interest that the party should die. But it has been said, there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy.[i] The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition: accountable however to the Court of Chancery, and to the *non compos* himself, if he recovers; or otherwise to his administrators.

In this care of idiots and lunatics the civil law agrees with ours; by assigning them tutors to protect their persons, and curators to manage their estates. But in another instance the Roman law goes much beyond the English. For, if a man by notorious prodigality was in danger of wasting his estate, he was looked upon as *non compos*, and committed to the care of curators or tutors by the prætor.[j] And by the laws of Solon such prodigals were branded with perpetual infamy.[k] But with us, when a man on an inquest of idiocy has been returned an *unthrift*, and not an *idiot*,[l] no farther proceedings have been had. And the propriety of the practice itself seems to be very questionable. It was doubtless an excellent method of benefiting the individual, and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their
[307] own property as they please. "*Sic utere tuo, ut alienum non lædas*," is the only restriction our laws have given with regard to economical prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigour.

This may suffice for a short view of the sovereign's *ordinary* revenue, or the proper patrimony of the Crown; which was very large formerly, and capable of being increased to a magnitude truly formidable; for there are very few estates in the kingdom that have not, at some period or other since the

[i] 2 P. Wms. 638.
[j] Ff. 27, 10, 6, 16.
[k] Potter, Antiq. b. 1, c. 26.
[l] Bro. Abr. tit. *Idiot*, 4.

Norman conquest, been vested in the hands of the sovereign by forfeiture, escheat, or otherwise. But fortunately for the liberty of the subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits, arising from the other branches of the *census regalis*, are likewise almost all of them alienated from the Crown. In order to supply the deficiences of which, we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the *extraordinary* revenue of the Crown. For, the public patrimony being got into the hands of private subjects, it is but reasonable that private contributions should supply the public service. Which, though it may perhaps fall harder upon some individuals, whose ancestors have had no share in the general plunder, than upon others, yet taking the nation throughout, it amounts to nearly the same; provided the gain by the extraordinary should appear to be no greater than the loss by the ordinary revenue. And, perhaps, if every gentleman in the kingdom was to be stripped of such of his lands as were formerly the property of the Crown; was to be again subject to the inconveniences of purveyance and pre-emption, the oppression of forest laws, and the slavery of feudal tenures; and was to resign to the Crown all his royal franchises of waifs, wrecks, estrays, treasure-trove, mines, forfeitures, and the like; he would find himself a greater loser, than by paying his *quota* to such taxes as are necessary to the support of the government. The thing therefore to be wished and aimed at in a land of liberty is by no means the total abolition of taxes, which would draw after it very pernicious consequences, and the very supposition of which is the height of political absurdity. For as the true idea of government and magistracy will be found to consist in this, that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend to their private concerns; it is necessary that those individuals should be bound to contribute a portion of their private gains, in order to support that government, and reward that magistracy which protects them in the enjoyment of their respective properties. But the things to be aimed at are wisdom and moderation, not only in granting, but also in the method of raising the necessary supplies; by contriving to do both in

II. Extraordinary revenue.

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such a manner as may be most conducive to the national welfare, and at the same time most consistent with economy and the liberty of the subject; who, when properly taxed, contributes only, as was before observed, some part of his property, in order to enjoy the rest.

Of aids, subsidies, and supplies voted by the Commons.

These extraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies; and are granted, as we have formerly seen, by the Commons of Great Britain 'and Ireland' in Parliament assembled: who, when they have voted a supply to the Crown, and settled the *quantum* of that supply, usually resolve themselves into what is called *a committee of ways and means*, to consider the ways and means of raising the supply so voted. And in this committee every member (though it is looked upon as the peculiar province of the chancellor of the exchequer), may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions of this committee, when approved by a vote of the House, are in general esteemed to be (as it were) final and conclusive. For, though the supply cannot be actually raised upon the subject till directed by an Act of the whole Parliament, yet no monied [309] man will scruple to advance to the government any quantity of ready cash, on the credit of a bare vote of the House of Commons, though no law be yet passed to establish it.

The taxes which are raised upon the subject were formerly either annual or perpetual. The usual annual taxes were formerly those upon land and malt, 'both of which have now been made perpetual.'

I. Land-tax.

I. The land-tax, in its modern shape, superseded (at least until a recent period) all the former methods of rating either property, or persons in respect of their property, whether by tenths or fifteenths, subsidies on lands, hidages, scutages, or talliages; a short explication of which will however greatly assist us in understanding our ancient laws and history.

Tenths and fifteenths.

Tenths and fifteenths[m] were temporary aids issuing out of personal property, and granted to the Crown by Parliament. They were formerly the real tenth or fifteenth part of all the moveables belonging to the subject; when such moveables, or personal estates, were a very different and a much less consi-

[m] 2 Inst. 77; 4 Inst. 31.

derable thing than what they usually are at this day. Tenths are said to have been first granted under Henry the Second, who took advantage of the fashionable zeal for crusades to introduce this new taxation, in order to defray the expense of a pious expedition to Palestine, which he really or seemingly had projected against Saladin. Emperor of the Saracens; whence it was originally denominated the Saladin tenth.[n] But afterwards fifteenths were more usually granted than tenths. Originally the amount of these taxes was uncertain, being levied by assessments new made at every fresh grant of the Commons, a commission for which is preserved by Matthew Paris;[o] but it was at length reduced to a certainty in the eighth year of Edward III., when, by virtue of the king's commission, new taxations were made of every township, borough, and city in the kingdom, and recorded in the Exchequer: [310] which rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 29,000*l.*, and therefore it still kept up the name of a fifteenth, when, by the alteration of the value of money, and the increase of personal property, things came to be in a very different situation. So that when, of later years, the Commons granted the Crown a fifteenth, every parish in England immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid in the eighth of Edward III.; and then raised it by a rate among themselves, and returned it into the royal exchequer.

Scutages on knight's fees.

The other ancient levies were in the nature of a modern land-tax: for we may trace up the origin of that charge as high as to the introduction of our military tenures; when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time by making a pecuniary satisfaction to the Crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessment, at so much for every knight's fee, under the name of scutages; which appear to have been levied for the first time in the fifth year of Henry the Second, on account of his expedition to

[n] Hoved. A.D. 1188; Carte, 1, 719.

[o] A.D. 1232.

Toulouse, and were then (I apprehend) mere arbitrary compositions, as the king and the subject could agree. But this precedent being afterwards abused into a means of oppression (in levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops, and pay their contingent expenses), it became thereupon a matter of national complaint; and King John was obliged to promise in his *Magna Charta*, that no scutage should be imposed without the consent of the common council of the realm. This clause was indeed omitted in the charters of Henry III., where we only find it stipulated, that scutages should be taken as they were used to be in the time of King
[311] Henry the Second.[p] Yet afterwards, by a variety of statutes under Henry I. and his grandson,[q] it was provided, that the king shall not take any aids or tasks, any talliage or tax, but by the common assent of the great men and Commons in Parliament.

hidages, talliages, and subsidies.

Of the same nature with scutages upon knights' fees were the assessments of hidage upon all other lands, and of talliage upon cities and burghs.[r] But they all gradually fell into disuse upon the introduction of subsidies, about the time of King Richard II. and King Henry IV. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4*s.* in the pound for lands, and 2*s.* 8*d.* for goods; and for those of aliens in a double proportion. But this assessment was also made according to an ancient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceeding low, that one subsidy of this sort, did not, according to Sir Edward Coke,[s] amount to more than 70,000*l.*, whereas a modern land-tax at the same rate produces two millions It was anciently the rule never to grant more than one subsidy and two-fifteenths at a time: but this rule was broken through for the first time on a very pressing occasion, the Spanish invasion in 1588; when the Parliament gave Queen Elizabeth two subsidies and four fifteenths. Afterwards, as money sunk in value more subsidies were given; and we have an instance in the first Parliament

p 9 Hen. III. c. 37.

q 25 Edw. I. c. 5, 6; 34 Edw. I. st. 4, c. 1; 14 Edw. III. st. 2, c. 1.

r Madox, Hist. Exch. 480.

s 4 Inst. 33.

of 1640, of the king's desiring twelve subsidies of the Commons to be levied in three years; which was looked upon as a startling proposal: though Lord Clarendon says,[t] that the Speaker, Serjeant Glanville, made it manifest to the House, how very inconsiderable a sum twelve subsidies amounted to, by telling them he had computed what he was to pay for them himself; and when he named the sum, he being known to be possessed of a great estate, it seemed not worth any farther [312] deliberation. And indeed, upon calculation, we shall find that the total amount of these twelve subsidies to be raised in three years, is greatly less than what would now be raised in one year by a land-tax of two shillings in the pound.

Ecclesiastical subsidies.

The grant of scutages, talliages, or subsidies by the Commons did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves in convocation: which grants of the clergy were confirmed in Parliament, otherwise they were illegal, and not binding: as the same noble writer observes of the subsidies granted by the convocation, which continued sitting after the dissolution of the first Parliament in 1640. A subsidy granted by the clergy was after the rate of 4*s.* in the pound according to the valuation of their livings in the king's books: and amounted, as Sir Edward Coke tells us,[u] to about 20,000*l.* While this custom continued, convocations were wont to sit as frequently as parliaments: but the last subsidies, thus given by the clergy, were those confirmed by statute 15 Car. II. c. 10, since which another method of taxation has generally prevailed, which takes in the clergy as well as the laity: in recompense for which the beneficed clergy have from that period been allowed to vote at the election of knights of the shire; and thenceforward also the practice of giving ecclesiastical subsidies has fallen into total disuse.

The lay subsidy was usually raised by commissioners appointed by the Crown or the great officers of state: and therefore in the beginning of the civil wars between Charles I. and his Parliament, the latter having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments[v] of a specific sum upon the several counties of the kingdom; to be levied

[t] Hist. b. 2 [u] 4 Inst. 33. [v] 29 Nov.; 4 Mar. 1642.

by a pound-rate on lands and personal estates; which were [313] occasionally continued during the whole usurpation, sometimes at the rate of 120,000*l.* a month, sometimes at inferior rates.[w] From this time forwards we hear no more of subsidies,[x] but occasional assessments were granted as the national emergencies required. These periodical assessments, the subsidies which preceded them, and the more ancient scutage, hidage, and talliage, were to all intents and purposes a land-tax; and the assessments were sometimes expressly called so.[y] Yet a popular opinion has prevailed, that the land-tax was first introduced in the reign of King William III.; because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom: which, though by no means a perfect one, had this effect, that a supply of 500,000*l.* was equal to 1*s.* in the pound of the value of the estates given in. And

Present Land-tax Act.

according to this enhanced valuation from the year 1693 to '1798,' a period of 'more than a century,' the land-tax continued an annual charge upon the subject; above half the time at 4*s.* in the pound, sometimes at 3*s.*, sometimes at 2*s.*, twice[z] at 1*s.*, but without any total intermission. 'Finally, by the statute 38 Geo. III. c. 60 (which was amended by several subsequent Acts), the land-tax was made perpetual, and fixed at 4*s.* in the pound, but subject to redemption in most cases by the owner of the property charged buying so much stock in the government funds as yields a dividend, exceeding by a tenth part, the amount of the land-tax. The terms of redemption have, however, been recently reduced where it has not been redeemed.'[a] The method of raising it is by charging a particular sum upon each county, according to the valuation given in A.D. 1692: and this sum is assessed and raised upon [14] individuals (their personal estates, as well as real, being liable

[w] One of these bills of assessment, in 1656, is preserved in Scobell's collection, 400.

[x] After the Restoration, the ancient method of granting subsidies, instead of such monthly assessments, was twice, and twice only, renewed; viz. in 1663, when four subsidies were granted by the temporality, and four by the clergy; and in 1670, when 800,000*l.* was raised by way of subsidy, which was the last time of raising supplies in that manner; the monthly assessments now established by custom being raised by commissioners named by Parliament, and producing a more certain revenue. (Bl. Com. vol i. p. 313.)

[y] Com. Journ. 26 June; 9 Dec. 1678.

[z] In the years 1732 and 1733.

[a] 16 & 17 Vict. c. 74. 'As to the application of the monies arising from the redemption and purchase, see 16 & 17 Vict. c. 90.'

thereto) by commissioners appointed 'by Act of Parliament from time to time,' being the principal landholders of the county, and their officers.[b]

II. The other 'tax which was formerly' annual is the malt-tax. It is a sum raised every year by parliament, ever since 1697, by a duty on malt, 'formerly of 6*d.* but now of 2*s.* 7*d.* in the bushel. This tax was made perpetual by the statute 3 Geo. IV. c. 18, and' is under the management of the commissioners of 'Inland Revenue.' It is indeed no other than an annual excise; the nature of which species of taxation I shall presently explain. II. The malt-tax.

III. 'Another tax of comparatively recent introduction, and which, although at present imposed only for a limited period, may not improbably become perpetual in point of fact, is the property and income tax. A tax of this kind under the name of income tax was imposed in 1797, during the war with France, and continued until 1802, and was again revived in 1803, and continued until 1816, when it was finally repealed. The present tax originated in 1842, and by it duties of 7*d.* in the pound were granted on the property and income of all persons in Great Britain possessed of 150*l.* a year and upwards.[c] Although imposed at first for only three years, it was continued by subsequent Acts, and during the late war with Russia the tax was raised to and extended to Ireland, and to all incomes of 100*l.* a year. The Act under which it is at present collected expires in 1860, unless in the mean time it be extended for a further period.' III. Property and income tax.

'The taxes which, although varied in amount, have always been perpetual in their nature, are'—

I. *The customs;* or the duties, toll, tribute, or tariff, payable upon merchandise exported and imported. The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was vested in the king, were said to be two;[d] 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound of common right to maintain I. The customs' duties.

[b] 16 & 17 Vict. c. 111. [c] 5 & 6 Vict. c. 35. [d] Dyer, 165.

and keep up the ports and havens, and to protect the merchant from pirates. Some have imagined they are called with us customs, because they were the inheritance of the king by immemorial usage and the common law, and not granted him by any statute:[e] but Sir Edward Coke has clearly shown,[f] that the king's first claim to them was by grant of parliament 3 Edw. I., though the record thereof is not now extant. And indeed this is in express words confessed by statute 25 Edw. I. c. 7, wherein *the king promises to take no customs from merchants* [315] *without the common assent of the realm*, "saving to us and our heirs, the customs on wool, skins, and leather, formerly granted to us by the commonalty aforesaid." These were formerly called the hereditary customs of the Crown; and were due on the exportation only of the said three commodities, and of none other; which were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those ports where the king's staple was established, in order to be there first rated, and then exported.[g] They were denominated in the barbarous Latin of our ancient records, *custuma*;[h] not *consuetudines*, which is the language of our law whenever it means merely usages. The duties on wool, sheep-skins, or woolfells, and leather, exported, were called *custuma antiqua sive magna:* and were payable by every merchant, as well native as stranger; with this difference, that merchant-strangers pay an additional toll, viz., half as much again as was paid by natives. The *custuma parva et nova* were an impost of 3*d.* in the pound, due from merchant-strangers only, for all commodities as well imported as exported, which was usually called the alien's duty, and was first granted in 31 Edw. I.[i] But these ancient hereditary customs, especially those on wool and woolfells, came to be of little account when the nation became sensible of the advantages of a home manufacture, and prohibited the exportation of wool by statute 11 Edw. III. c. 1; 'and the alien's duty was eventually abolished by the statute 24 Geo. III. sess. 2, c. 16.'

Prisage or butlerage.

There is also another very ancient hereditary duty belonging

[e] Dyer, 43, pl. 24.

[f] 2 Inst. 58, 59.

[g] Dav. 9.

[h] This appellation seems to be derived from the French word *coustum*, or *costum*, which signifies toll or tribute, and owes its own etymology to the word *coust*, which signifies price, or, as we have adopted it, *cost*.

[i] 4 Inst. 29.

to the Crown, called the *prisage*, or *butlerage* of wines; which is considerably older than the customs, being taken notice of in the great roll of the Exchequer, 8 Ric. I. still extant.[j] Prisage was a right of *taking* two tons of wine from every ship (English or foreign) importing into England twenty tons [316] or more, one before and one behind the mast; which by charter of Edward I. was exchanged into a duty of 2*s.* for every ton imported by merchant-strangers, and called butlerage, because paid to the king's butler.[k]

Other customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna:* tonnage was a duty upon all wines imported, over and above the prisage and butlerage aforesaid: poundage was a duty imposed *ad valorem,* at the rate of 12*d.* in the pound, on all other merchandise whatsoever; and the other imposts were such as were occasionally laid on by parliament, as circumstances and times required.[l] These distinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together under the one denomination of the *customs.*

By these we understand, at present, a duty or subsidy paid by the merchant, at the quay, upon all imported as well as exported commodities, by the authority of parliament; unless where, for particular national reasons, certain *rewards, bounties,* or *drawbacks* are allowed for particular exports and imports. Those of tonnage and poundage, in particular, were at first granted, as the old statutes (and particularly 1 Eliz. c. 19) express it, for the defence of the realm, and the keeping and

Tonnage and poundage.

[j] Madox, Hist. Exch. 526, 532.

[k] Dav. 8; 2 Bulstr. 254; Stat. of Estr. 16 Edw. II.; Com. Journ. 27 Apr. 1689. 'Part of the duties of prisage and butlerage were granted by Charles II. to his natural son by Barbara Villiers, the ancestor of the present Duke of Grafton; for purchasing which a contract was entered into by the Treasury, under stat. 43 Geo. III. c. 156, by which an annuity of 6,870*l.* was to be secured to the duke and his heirs, which, in default of such heirs, reverted to the Crown. This agreement was confirmed by 46 Geo. III. c. 79. The Duke of Grafton has also an annuity on the Post-office of 3,384*l.*, for the redemption of which the statute 19 & 20 Vict. c. 43, was passed. The Treasury of Ireland was, by stat. 46 Geo. III. c. 94, empowered to purchase the duty of prisage from the Earl of Ormond; and prisage and butlerage in Ireland were abolished by statute 51 Geo. III. c. 51.'

[l] Dav. 11, 12.

safeguard of the seas, and for the intercourse of merchandise safely to come into and pass out of the same. They were at first usually granted only for a stated term of years, as, for two years in 5 Ric. II.;[m] but in Henry the Sixth's time, they were granted him for life by a statute in the thirty-first year of his reign: and again to Edward IV., for the term of his
[317] life also: since which time they were regularly granted to all his successors for life, sometimes at the first, sometimes at other subsequent parliaments, till the reign of Charles the First; when as the noble historian expresses it,[n] his ministers were not sufficiently solicitous for a renewal of this legal grant. And yet these imposts were imprudently and unconstitutionally levied and taken, without consent of parliament, for fifteen years together, which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion and murder. For, as in every other, so in this particular case, the king (previous to the commencement of hostilities) gave the nation ample satisfaction for the errors of his former conduct, by passing an Act,[o] whereby he renounced all power in the Crown of levying the duty of tonnage and poundage, without the express consent of parliament; and also all power of imposition upon any merchandises whatever. Upon the Restoration this duty was granted to King Charles the Second for life, and so it was to his two immediate successors; but by three several statutes, 9 Ann. c. 6, 1 Geo. I. c. 12, and 3 Geo. I. c. 7, they were made perpetual, and mortgaged for the debt of the public. The customs thus imposed by parliament are chiefly contained in two books of rates, set forth by parliamentary authority;[p] one signed by Sir Harbottle Grimston, Speaker of the House of Commons in Charles the Second's time; and the other an additional one signed by Sir Spencer Compton, Speaker in the reign of George the First. 'Various additional duties were imposed from time to time, causing great embarrassments as well to the collectors, as to the merchants and persons on whom they were levied. Until in 1787, by the statute 27 Geo. III. c. 13, the first Customs' Consolidation Act, the collection of these duties was improved by abolishing all these then subsisting, and substituting in their stead a

[m] Sir John Davis' Rep. 12.

[n] Hist. Rebell. b. 3.

[o] 16 Car. I. c. 8.

[p] Stat. 12 Car. II. c. 4; 11 Geo. I. c. 7.

single duty on each article. Subsequent alterations called for further consolidation at various periods, the last of which and the statute now in force on this subject is the Customs' Tariff Act, 1855, which enumerates all the articles on which duties are now levied.'

These customs are then, we see, a tax immediately paid by the merchant, although ultimately by the consumer. And yet these are the duties felt least by the people; and, if prudently [318] managed, the people hardly consider that they pay them at all. For the merchant is easy, being sensible he does not pay them for himself; and the consumer, who really pays them, confounds them with the price of the commodity: in the same manner, as Tacitus observes, that the Emperor Nero gained the reputation of abolishing the tax on the sale of slaves, though he only transferred it from the buyer to the seller; so that it was, as he expresses it, "*remissum magis specie, quam vi: quia cum venditor pendere juberetur, in partem pretii emptoribus accrescebat.*"[q] But this inconvenience attends it on the other hand, that these imposts, if too heavy, are a check and cramp upon trade; and especially when the value of the commodity bears little or no proportion to the quantity of the duty imposed. This in consequence gives rise also to smuggling, which then becomes a very lucrative employment: and its natural and most reasonable punishment, viz., confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty. Recourse must therefore be had to extraordinary punishments to prevent it; which destroys all proportion of punishment,[r] and puts 'felons' upon an equal footing with such as are really guilty of no natural, but merely a positive offence.

There is also another ill consequence attending high imposts on merchandise, formerly not frequently considered, but indisputably certain; that the earlier any tax is laid on a commodity, the heavier it falls upon the consumer in the end: for every trader through whose hands it passes must have a profit, not only upon the raw material, and his own labour and time

[q] Hist. l. 13.

[r] Montesq. Sp. L. b. 13, c. 8.

in preparing it, but also upon the very tax itself, which he advances to the government; otherwise he loses the use and interest of the money which he so advances. 'This disadvantage was ultimately felt to be so considerable, as to lead to the introduction of the system of warehousing goods in bond, first suggested in this country by Sir Robert Walpole, by which payment of the duty may be, and is in practice, deferred by the importer of the goods, until he has effected his sales, and the articles are withdrawn for the purposes of consumption and use.'[s]

II. The excise duties.

[319] II. Directly opposite in its nature to this is the *excise duty*, which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption. This is doubtless, impartially speaking, the most economical way of taxing the subject: the charges of levying, collecting, and managing the excise duties being considerably less in proportion than in other branches of the revenue. It also renders the commodity cheaper to the consumer, than charging it with customs to the same amount would do; for the reason just now given, because generally paid in a much later stage of it. But, at the same time, the rigour and arbitrary proceedings of excise laws seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers a power of entering and searching the houses of such as deal in exciseable commodities, at any hour of the day, and in many cases, of the night likewise. And the proceedings in case of transgressions are so summary and sudden, that a man may be convicted in two days' time, in the penalty of many thousand pounds, by two commissioners or justices of the peace; to the total ex-
[320] clusion of the trial by jury, and disregard of the common law. For which reason, though Lord Clarendon tells us,[t] that to his knowledge the Earl of Bedford (who was made lord treasurer by King Charles the First, to oblige his parliament)

[s] The first statute sanctioning this improvement was the Act 43 Geo. III. c. 132. The statute now in force is the Act 16 & 17 Vict. c. 107.

[t] Hist. b. 3.

intended to have set up the excise in England, yet it never made a part of that unfortunate prince's revenue; being first introduced on the model of the Dutch prototype by the parliament itself after its rupture with the Crown. Yet such was the opinion of its general unpopularity, that when in 1642 "aspersions were cast by malignant persons upon the House "of Commons, that they intended to introduce excises, the "house for its vindication therein did declare, that these "rumours were false and scandalous; and that their authors "should be apprehended and brought to condign punish-"ment." [u] However, its original[v] establishment was in 1643, and its progress was gradual, being at first laid upon those persons and commodities where it was supposed the hardship would be the least perceivable, viz., the makers and vendors of beer, ale, cider, and perry; [w] and the royalists at Oxford soon followed the example of their brethren at Westminster by imposing a similar duty; both sides protesting that it should be continued no longer than to the end of the war, and then be utterly abolished." [x] But the parliament at Westminster soon after imposed it on flesh, wine, tobacco, sugar, and such a multitude of other commodities, that it might fairly be denominated general: in pursuance of the plan laid down by Prynne (who seems to have been the father of the excise), in his letter to Sir John Hotham,[y] signifying "that they had [321] "proceeded in the excise to many particulars, and intended to "go on farther, but that it would be necessary to use the "people to it by little and little." And afterwards, when the nation had been accustomed to it for a series of years, the succeeding champions of liberty boldly and openly declared "the impost of excise to be the most easy and indifferent levy "that could be laid upon the people: [z] and accordingly con-

[u] Com. Journ. 8 Oct. 1642.

[v] The translator and continuator of Petavius's chronological history (Lond. 1659, fol.) informs us, that it was first moved for, 28 Mar. 1643, by Prynne. And it appears from the journals of the Commons, that on that day the House resolved itself into a committee to consider of raising money, in consequence of which the excise was afterwards voted. But Prynne was not a member of Parliament till 7 Nov. 1648; and published in 1654 "A protestation against the illegal, detestable, and oft-condemned tax and extortion of excise in general." It is probably therefore a mistake of the printer for Pymme, who was intended for Chancellor of the Exchequer under the Earl of Bedford. (Lord Clar. b. 7.)

[w] Com. Journ. 17 May, 1643.

[x] Lord Clar. b. 7.

[y] 30 May, 1643. Dugdale, of the Troubles, 120.

[z] Ord. 14 Aug. 1649, c. 50; Scobel. 72; Stat. 1656, c. 19; Scobel. 453.

tinued it during the whole usurpation. Upon King Charles's return, it having then been long established, and its produce well known, some part of it was given to the Crown in 12 Car. II. by way of purchase (as was before observed) for the feudal tenures and other oppressive parts of the hereditary revenue. But, from its first origin to the present time, its very name has been odious to the people of England. It has nevertheless been imposed on abundance of other commodities in the reigns of King William III., and every succeeding prince, to support the enormous expenses occasioned by our wars on the continent. Thus brandies and other spirits are now excised at the distillery, and malt liquors brewed for sale at the brewery; for coaches and other wheel-carriages the occupier is excised, though not with the same circumstances of arbitrary strictness as in most of the other instances. To these we may add paper and pasteboard; malt, as before mentioned, and vinegar; for all which the duty is paid by the manufacturer; hops, for which the person that gathers them is answerable; candles and soap, 'and sugar manufactured
[322] in the United Kingdom,'[a] which are paid for at the maker's; —a list which no friend to his country would wish to see farther increased.[b]

'A great portion, however, of the excise duties arises from a tax levied not on the articles directly, but on the persons dealing therein, and on persons exercising particular trades, in the shape of annual licences. Within this category are the duties paid by auctioneers, persons letting horses to hire, ale and beer-house keepers, dealers in coffee, tea, tobacco, snuffs, &c.; dealers in game, soap-makers, and distillers and dealers

[a] 13 & 14 Vict. c. 67.

[b] 'The list of articles now subject to excise does not, however, include many that were liable to duty in the time of Sir William Blackstone. The adoption of sounder principles of taxation than those which formerly prevailed, have led only recently to the repeal of the duties formerly levied on the manufacture of glass and bricks.' Printed silks, linens and papers, leather and skins and starch, were formerly subject to duties, in common with gold and silver wire and plate, and with lands and goods sold by auction. The duty upon salt was formerly another distinct branch of the extraordinary revenue. It was not generally called an excise, because under the management of different commissioners: but the commissioners of the salt duties had by statute 1 Ann. c. 21, the same powers, and must have observed the same regulations, as those of other excises. This tax was only temporary; till by statute 26 Geo. II. c. 3, it was made perpetual. There were both *excise* and *customs* duties on salt, but both were abolished by the statutes 5 Geo. IV. c. 65, and 6 Geo. IV. c. 111. (Bl. Com. v. i. p.321.)

in spirits and foreign wines. The duties payable on stage and hackney-carriages, and in respect of railway passengers, are also now included under the excise duties.'[c]

III. Another very considerable branch of the revenue is levied with greater cheerfulness, as, instead of being a burden, it is a manifest advantage to the public. I mean the post-office, or duty for the carriage of letters. As we have traced the origin of the excise to the parliament of 1643, so it is but justice to observe that this useful invention owes its first legislative establishment to the same assembly. It is true, there existed post-masters in much earlier times; but I apprehend their business was confined to the furnishing of post-horses to persons who were desirous to travel expeditiously, and to the despatching of extraordinary packets upon special occasions. King James I. originally erected a post-office under the control of one Matthew de Quester or de l'Equester, for the conveyance of letters to and from foreign parts; which office was afterwards claimed by Lord Stanhope,[d] but was confirmed and continued to William Frizell and Thomas Witherings by King Charles I., A.D. 1632, for the better accommodation of the English merchants.[e] In 1635, the same prince erected a letter-office for England and Scotland, under the direction of the same Thomas Witherings, and settled certain rates of postage;[f] but this extended only to a few of the principal roads, the times of carriage were uncertain, and the post-masters on each road were required to furnish the mail with horses at the rate of $2\frac{1}{2}d.$ a mile. Witherings was superseded for abuses in the execution of both his offices, in 1640; and they were sequestered into the hands of Philip Burlamachy, to be exercised under the care and oversight of the principal Secretary of State.[g] On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of the letter-office. And about that time the outline of the present more extended and regular plan seems to have been conceived by Mr. Edward Prideaux, who was appointed Attorney-general to the Commonwealth after the

III. Post-office duty.

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[c] 10 & 11 Vict. c. 42.

[d] Latch. Rep. 87.

[e] 19 Rym. Fœd. 585.

[f] 19 Rym. Fœd. 650; 20 Rym. Fœd. 192.

[g] 20 Rym. Fœd. 429.

death of King Charles. He was chairman of a committee in 1642, for considering what rates should be set upon inland letters;[h] and afterwards appointed post-master by an ordinance of both the Houses,[i] in the execution of which office he first established a *weekly* conveyance of letters into *all* parts of the nation;[j] thereby saving to the public the charge of maintaining post-masters to the amount of 7000*l. per annum.* And, his own emoluments being probably very considerable, the common council of London endeavoured to erect another post-office in opposition to his, till checked by a resolution of the House of Commons,[k] declaring that the office of post-master is and ought to be in the sole power and disposal of the parliament. This office was afterwards farmed by one Manley, in 1654:[l] but in 1657, a regular post-office was erected by the authority of the Protector and his parliament,[m] upon nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign of Queen Anne.[n] After the Restoration, a similar office, with
[324] some improvements, was established by statute 12 Car. II. c. 35, but the rates of letters were altered, and some farther regulations added by many subsequent statutes, by which penalties were enacted, in order to confine the carriage of letters to the public office only, except in some few cases: a provision which is absolutely necessary; for nothing but an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one another. The privilege of letters coming free of postage to and from members of parliament, was claimed by the House of Commons in 1660, when the first legal settlement of the present post-office was made; but afterwards dropped[o] upon a private

[h] Com. Journ. 28 Mar. 1642.

[i] Com. Journ. 7 Sept. 1644.

[j] Com. Journ. 21 Mar. 1649.

[k] Com. Journ. 21 Mar. 1649.

[l] Scobell, 358.

[m] The preamble of the ordinance of Cromwell states, that establishing one general post-office, besides the benefit to commerce, and the convenience of conveying public despatches, "will be the best means to discover and prevent many dangerous and wicked designs against the Commonwealth." And it would seem that the policy of having the correspondence of the kingdom under the inspection of Government is still continued; for, by a warrant from one of the principal Secretaries of State, letters may be detained and opened. (9 Ann. c. 10, s. 40.)—[Christian.]

[n] Com. Journ. 9 June, 1657; Scobell, 511.

[o] Com. Journ. 17 Dec. 22 Dec. 16[illegible]

assurance from the Crown that this privilege should be allowed the members.[p] And accordingly a warrant was constantly issued to the postmaster-general,[q] directing the allowance thereof to the extent of two ounces in weight; till at length it was expressly confirmed by statute 4 Geo. III. c. 24. 'As commerce and education increased, however, the charge made by the government for conveying letters from one part of the kingdom to another, was felt to be unnecessarily high with reference to the expense of conveying and distributing letters; and at the same time to lead to numerous petty frauds and evasions of the statutes relating to the post-office. The result of a long inquiry and full discussion in parliament was the establishment, in 1840, of the existing system of a uniform rate, beginning at one penny, and increasing according to weight. The privilege of members of parliament was at the same time abolished.[r] Facilities are also now given for the transmission of printed periodical publications and other works at still lower rates.'[s]

IV. A fourth branch of the perpetual revenue consists in the stamp duties, which are a tax imposed upon all parchment and paper whereon private instruments of almost any nature whatsoever, are written; 'and on probates of wills and letters of administration, and also on various licences, other than those mentioned under the head of excise duties, as marriage licenses, and licenses to practise and exercise various callings, such as that of an attorney; and on admissions to offices and degrees.' These imposts are very various, according to the nature of the thing stamped, rising gradually from a penny to many pounds. This is also a tax, which, though in some

IV. Stamp duties.

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[p] Com. Journ. 16 Apr. 1735.

[q] Com. Journ. 26 Feb. 1734.

[r] 2 & 3 Vict. c. 52; 3 & 4 Vict. c. 96; 10 & 11 Vict. c. 85. Newspapers, which were formerly liable to a stamp duty, and were carried free by the post-office, are now charged with postage in lieu of the abolished stamp duty. (18 & 19 Vict. c. 27.)

[s] Sir William Blackstone was of opinion, that "There could not be devised a more eligible method than this, of raising money upon the subject; for therein both the government and the people find a mutual benefit. The government acquires a large revenue, and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed." 'The notion of modern times, however, is that the postal charges should be considered not so much as a source of revenue, as an indemnity to the government for the cost of conveying and distributing letters. The post-office in 1855, however, yielded a sum of 1,137,220*l.* to the revenue.'

instances it may be heavily felt, by greatly increasing the expense of all mercantile as well as legal proceedings, yet (if moderately imposed) is of service to the public in general, by authenticating instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently, by marks known to none but themselves, a man that would forge a deed of King William's time must know and be able to counterfeit the stamp of that date also. In some countries the duty is laid on the contract itself, and not on the instrument in which it is contained; but this tends to draw the subject into a thousand nice disquisitions and disputes concerning the nature of his contract, and whether taxable or not; in which the farmers of the revenue are sure to have the advantage.[t] Our general method answers the purposes of the State as well, and consults the ease of the subject much better. The first institution of the stamp duties was by statute 5 & 6 Wm. & M. c. 21, and they have since, in many instances, been increased to ten times their original amount, 'while, on the other hand, the duties on many instruments and documents have been in some cases wholly repealed, and in others considerably reduced.'

V. Succession duties.

V. 'A fifth, and very important branch of the revenue, consists in the duties charged on the succession to real and personal property.'

'For many years persons succeeding to personal property (including leaseholds), whether they took by will as executors or legatees, or merely as administrators or next of kin, were charged heavy duties, varying, however, according to the relationship, and the value of the property bequeathed to them, or to which they succeeded. This duty was payable besides the *ad valorem* duty, which was, and still is levied in the first instance, on the grant of probate or letters of administration, according to the estimated sworn value of the personal property of the deceased. This latter comes, as we have already seen, within the category of the stamp duties. The legacy duty, as it was generally termed, was chargeable after the estate of the deceased had been realised and administered, on the property distributed among the legatees or next of kin, as the

[t] Sp. of L. b. xiii. c. 9.

case might be; and varied in amount, according to the consanguinity of the next of kin, or the absence of any relationship between the legatee and the testator. The exemption of real estate from this species of taxation was long complained of, as creating an undue preference in favour of the holders of landed property, and this exemption has now accordingly been removed. By the Succession Duties Act, 1853 (16 & 17 Vict. c. 51), duties are imposed on every succession to property (whether real or personal), according to the value and the relationship of the parties to the predecessor. Where the successor is the lineal issue or lineal ancestor of the predecessor, 1*l.* per cent.; where a brother or sister, or a descendant of a brother or sister, 3*l.* per cent.; where a brother or sister of the father or mother, or a descendant of the brother or sister of the father or mother of the predecessor, 5*l.* per cent.; where a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the predecessor, 6*l.* per cent.; and where the successor is in any other degree of collateral consanguinity to the predecessor, or is a stranger in blood to him, 10*l.* per cent. The value of the succession, if it be to real property, is ascertained by considering the interest of the successor as of the value of an annuity equal to the annual value of the property, estimated as the Act directs; and the duty may be paid by eight equal half-yearly instalments, or at once, according to the wish of the party liable thereto.'

VI. Inhabited house duty.

VI. A sixth branch is the duty upon houses. As early as the Conquest, mention is made in Domesday Book of fumage or fuage, vulgarly called smoke farthings; which were paid by custom to the king for every chimney in the house. And we read that Edward the Black Prince (soon after his successes in France), in imitation of the English custom, imposed a tax of a florin upon every hearth in his French dominions.[u] But the first parliamentary establishment of it in England [326] was by statute 13 & 14 Car. II. c. 10, whereby a hereditary revenue of 2*s.* for every hearth, in all houses paying to church and poor, was granted to the king for ever. And, by subsequent statutes for the more regular assessment of this tax, the constable and two other substantial inhabitants of the

[u] Mod. Un. Hist. xxiii. 463; Spelm. Gloss. tit. *Fuage.*

parish, to be appointed yearly (or the surveyor appointed by the Crown, together with such constable or other public officer), were, once in every year, empowered to view the inside of every house in the parish. But, upon the Revolution, by statute 1 Wm. & M. st. 1, c. 10, hearth-money was declared to be "not only a great oppression to the poorer sort, but a "badge of slavery upon the whole people, exposing every man's "house to be entered into and searched at pleasure by persons "unknown to him; and therefore to erect a lasting monument "of their Majesties' goodness in every house in the kingdom, "the duty of hearth-money was taken away and abolished." This monument of goodness remains among us to this day: but the prospect of it was somewhat darkened, when in six years afterwards by statute 7 Wm. III. c. 18, a tax was laid upon all houses (except cottages) of 2*s.* subsequently advanced to 3*s.* per annum, and a tax also upon all windows, if they exceeded nine, in such house. These rates were from time to time varied, 'and extended, until, by stat. 3 & 4 Will. IV. c. 39, the house tax was abolished, the duty on windows remaining until recently. By the statute 14 & 15 Vict. c. 36, the duties on windows were repealed, and in lieu thereof, a tax was once more imposed on inhabited houses.'

VII. Assessed taxes.

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VII. The seventh branch of the extraordinary perpetual revenue is a duty for every male servant retained, or employed in the several capacities specifically mentioned in the Act of Parliament, and which almost amount to an universality, except such as are employed in husbandry, trade, or manufactures. 'Under this head are comprised the duties payable by the owners of private carriages, horses and dogs, and by persons using the same, on hair powder, and armorial bearings. It may be considered also to include game certificates.'

VIII. Duty on offices and pensions.

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VIII. The eighth and last branch of the extraordinary perpetual revenue is the duty upon offices and pensions; consisting in an annual payment (over and above all other duties) out of all salaries, fees, and perquisites of offices and pensions payable by the Crown, exceeding the value of 100*l.* per annum. This highly-popular taxation was imposed by statute 31 Geo. II. c. 22, 'and was made perpetual by the statute 6 & 7 Will. IV. c. 97.'

'It may be observed that the public revenues of Great Britain and Ireland were by statute 56 Geo. III. c. 98, consolidated into one fund, and that most of the duties above enumerated are now under the management of the Board of Commissioners of Inland Revenue, recently substituted for the separate Boards of Excise and Stamps and Taxes;[v] and that the charges of their collection and management are provided by annual votes of parliament.'[w]

The clear net produce of these several branches of the revenue, after all charges of collecting and management paid, amount at present annually to about 'fifty millions sterling. In 1855, owing to increased taxation on account of the war with Russia, the net revenue of the country reached 63,364,605*l.*' How these immense sums are appropriated, is next to be considered. And this is, first, to the payment of the interest of the national debt. **How these taxes are appropriated.**

In order to take a clear and comprehensive view of the nature of this national debt, it must first be premised, that after the Revolution, when our new connexions with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars, as principals, on the Continent for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the House of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree; insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the State, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed; by this means converting the principal debt into a new species of property, transferable from one man to another, at any time, and in any quantity. A system which seems to have had its origin in the State of Florence, A.D. 1344: which government then owed about [329] **Of the national debt.**

[v] 12 & 13 Vict. c. 1; and see 16 & 17 Vict. c. 51, s 9.
[w] 17 & 18 Vict. c. 94.

60,000*l.* sterling; and being unable to pay it, formed the principal into an aggregate sum, called metaphorically a *mount* or *bank*, the shares whereof were transferable like our stocks, with interest at 5 per cent., the prices varying according to the exigencies of the State.[x] This policy of the English parliament laid the foundation of what is called the national debt; for a few long annuities created in the reign of Charles II. will hardly deserve that name. And the example then set was so closely followed during the long wars in the reign of Queen Anne, and since, 'by the seven years' war, the war with America and with France after the Revolution, and more recently by the Russian war,' that the capital of the national debt (funded and unfunded) amounted at the close of the 'year 1856 to upwards of seven hundred and seventy-five millions;' to pay the interest of which, and the charges of management (amounting 'in 1856' to upwards of 'twenty-seven' millions and a half), the extraordinary revenues just now enumerated are in the first place mortgaged and made perpetual by parliament. Perpetual, I say, but still redeemable by the same authority that imposed them; which, if at any time it can pay off the capital, will abolish those taxes which are raised to discharge the interest.

By this means the quantity of property in the kingdom is greatly increased in idea, compared with former times; yet if we coolly consider it, not at all increased in reality. We may boast of large fortunes, and quantities of money in the funds. But where does this money exist? It exists only in name, in paper, in public faith, in parliamentary security: and that is undoubtedly sufficient for the creditors of the public to rely on. But then what is the pledge which the public faith has pawned for the security of these debts? The land, the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these, therefore, and these only, the property of the public creditors does really and intrinsically exist: and of course the land, the trade, and the personal industry of individuals, are
[330] diminished in their true value just so much as they are pledged to answer. If A.'s income amounts to 100*l.* per annum; and

[x] *Pro tempore, pro spe, pro commodo, minuitur eorum pretium atque augescit.* Aretin. See Mod. Un. Hist. xxxvi. 116.

he is so far indebted to B. that he pays him 50*l.* per annum for his interest; one-half of the value of A.'s property is transferred to B. the creditor. The creditor's property exists in the demand which he has upon the debtor, and nowhere else; and the debtor is only a trustee to his creditor for one-half of the value of his income. In short, the property of a creditor of the public consists in a certain portion of the national taxes: by how much therefore he is the richer, by so much the nation, which pays these taxes, is the poorer.[y] Thus much is indis-

[y] 'Sir William Blackstone here adds:' —"The only advantage that can result to a nation from public debts is the increase of circulation by multiplying the cash of the kingdom, and creating a new species of currency, assignable at any time and in any quantity; always, therefore, ready to be employed in any beneficial undertaking, by means of this its transferable quality, and yet producing some profit even when it lies idle and unemployed. A certain proportion of debt seems, therefore, to be highly useful to a trading people; but what that proportion is it is not for me to determine."—"It is a very erroneous notion indeed to suppose that the property of the kingdom is increased by national debts, contracted in consequence of the expenses of war. On the contrary, the principal of the debt is the exact amount of the property which the nation has lost from its capital for ever. The American war cost the nation 116 millions sterling, and the effect is precisely the same as if so much of its wealth and treasure in corn, cattle, cloth, ammunition, coin, &c., had been collected together and thrown into the sea, besides the loss accruing from the destruction of many of its most productive hands. When this property is consumed, it never can be retrieved, though industry and care may acquire and accumulate new stores. Such a supply, by no mode of taxation that has yet been devised, could be collected at once, without exhausting the patience and endurance of the people. But by the method of funding, the subjects are induced to suppose that their suffering consists only in the payment of the yearly interest of this immense waste. The ruin is completed before the interest commences, for that is paid by the nation to the nation, and returns back to its former channel and circulation; like the balls in a tennis-court, however they may be tossed from one side to the other, their sum and quantity, within the court, continue the same. The extravagance of individuals naturally suggested the system of funding the public debts. When a man cannot satisfy the immediate demands of his creditor, it is an obvious expedient to give him a promissory note to pay him at a future day, with interest for the time; and if this is an assignable note, so that the creditor may be enabled to persuade another to advance him the principal and to stand in his place, it is exactly similar to the debts or securities of government, except that, in general, they are not payable at any definite time. All debts, when no effects remain, both in public and private, are certain evidence of the waste and consumption of so much property, which nothing can restore, though frugality and industry may alleviate the future consequences. When a debt is contracted, a man is not richer for paying it; if he owes one hundred pounds, and pays interest for it, he is in no degree richer by calling in one hundred pounds from which he receives the same interest, and therewith discharges the debt: but probably, if he does so, he will feel himself more comfortable and independent, and will find his credit higher, if his occasions should oblige him to borrow in future. So it is with governments; when the debt is contracted, and the money spent, the mischief is done; the discharge of the

putably certain, that the present magnitude of our national incumbrances is productive of the greatest inconveniences. For, first, the enormous taxes, that are raised upon the necessaries of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence as of the raw material, and of course, in a much greater proportion, the price of the commodity itself. Nay, the very increase of paper circulation itself, when extended beyond what is requisite for commerce or foreign exchange, has a natural tendency to increase the price of provisions as well as of all other merchandize. For, as its effect is to multiply the cash of the kingdom, and this to such an extent that much must remain unemployed, that cash (which is the universal measure of the respective values of all
[331] other commodities) must necessarily sink in its own value, and everything grow comparatively dearer. Secondly, if part of this debt be owing to foreigners, they draw out of the kingdom annually a considerable quantity of specie for the interest. Thirdly, if the whole be owing to subjects only, it is then charging the active and industrious subject, who pays his share of the taxes, to maintain the indolent and idle creditor who receives them. Lastly, and principally, it weakens the internal strength of a state, by anticipating those resources which should be reserved to defend it in case of necessity. The interest we now pay for our debts would be nearly sufficient to maintain any war, that any national motives could require.[z] And if our ancestors in King William's time had annually paid, so long as their exigencies lasted, even a less sum than we now annually raise upon their account, they would in the

debt can add nothing (or little comparatively) immediately to the stock or capital of the nation. But yet these important consequences may be expected from it, viz., from the abolition of taxes upon a melancholy catalogue of the necessary articles of life, taxes which take from those who have nothing to spare, the price of labour would be lowered, manufactures would flourish with renewed vigour, the minds of the people would be cheered, and the nation would again have credit and spirit to meet its most formidable enemies, and to repel and resent both injury and insult. All the nations of Europe have learnt from such dear-bought experience that poverty and misery are the inevitable consequences of war, as to give us reason to hope that the lives and property of mankind will not, in future, be dissipated with the profusion and wantonness of former times."—[CHRISTIAN.]

[z] 'It must be recollected that when Sir William Blackstone thus wrote, the national debt was not a sixth part of what it at present amounts to; but neither were wars conducted on so large or so expensive a scale.'

time of war have borne no greater burdens, than they have bequeathed to and settled upon their posterity in time of peace, and might have been eased the instant the exigence was over.

The respective produces of the several taxes before mentioned were originally separate and distinct funds; being securities for the sums advanced on each several tax, and for them only. But it became necessary, in order to avoid confusion, to reduce the number of these separate funds, by uniting and blending them together. 'In this way' three capital funds 'were formed' (the *aggregate* fund and the *general* fund, so called from such union and addition; and the *South Sea* fund), being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by that company and its annuitants. 'In 1786, by the statute 27 Geo. III. c. 13, these three funds were united into the "Consolidated Fund;" and by 56 Geo. III. c. 98, the consolidated fund, or revenue, of Great Britain was combined with that of Ireland, forming the Consolidated Fund of the United Kingdom, pledged for the payment of the interest of the Consolidated National Debt of the United Kingdom.'

The customs, excises, and other taxes, which are to support [332] these funds, depending on contingencies, upon exports, imports, and consumptions, must necessarily be of a very uncertain amount: but though some of them have proved unproductive, and others deficient, the sum total has always been considerably more than was sufficient to answer the 'annual' charge upon them. The surpluses therefore of the 'then existing' three great national funds, the aggregate, general, and South Sea funds, over and above the interest and annuities charged upon them, were directed by statute 3 Geo. I. c. 7, to be carried together, and to attend the disposition of parliament; and were usually denominated the *sinking* fund, because originally destined to sink and lower the national debt. 'In 1786, when, as we have seen, the revenue of the kingdom was consolidated, the sum of one million was directed to be annually set apart from the income of the country towards the extinction of the debt; but although no objection existed to this scheme as long as the annual revenue exceeded the expenditure, it became absurd when, in subsequent years, it was necessary to borrow the sum so reserved; and in 1824 the

The sinking fund.

plan of keeping up a nominal sinking fund, when in reality no surplus existed, was abandoned. In 1829, however, by the statute 10 Geo. IV. c. 37 (amended by the 3 & 4 Will. IV. c. 24), one-fourth part of the actual annual surplus revenue (when there is such a surplus) was directed to be applied for the future in reduction of the national debt. A board of commissioners exists for regulating this business, composed nominally of the speaker of the House of Commons, the chancellor of the exchequer, the master of the rolls, the lord chief baron of the Court of Exchequer, the accountant-general of the Court of Chancery, and the governor and deputy-governor of the Bank of England; but the actual control is exercised by the chancellor of the exchequer, assisted by the governor and deputy-governor of the Bank of England. The most substantial relief, however, from the pressure of the national debt, has arisen from lowering the rate of interest; while the conversion from time to time by the commissioners (in pursuance of powers given them for that purpose) of portions of the perpetual annuities into terminable annuities expiring at fixed periods, will ultimately effect some reduction both in the amount of the debt and in the annual payments on account of it. Nevertheless, by no means now existing is the total amount of the national debt ever likely to be materially reduced; and the policy adopted of late years has been rather to regulate the amount of taxation by the sum actually required from time to time for the public service and the interest of the debt, than to raise sums for the reduction of the principal.'

Before any part of the 'annual revenue' can be applied to diminish the principal of the public debt, it stands mortgaged by parliament to raise an annual sum for the maintenance of
[333] the royal household and the civil list. For this purpose, in the reigns 'of the Hanoverian kings,' the produce of certain branches of the excise and customs, the post-office, the duty on wine licenses, the revenues of the remaining Crown lands, the profits arising from courts of justice (which articles included all the hereditary revenues of the Crown), and also a clear annuity of 120,000*l.* in money, were settled on the king for life, for the support of his majesty's household, and the honour and dignity of the Crown. And as the amount of these several branches was uncertain, if they did not rise annually to

800,000*l.* the parliament engaged to make up the deficiency. But soon after the accession 'of George the Third,' the hereditary and other revenues were carried into and made a part of the aggregate fund, and the aggregate fund was charged with the payment of the whole annuity to the Crown of 800,000*l.*, 'subsequently increased to upwards of one million. A similar course was adopted on the accession of George the Fourth, William the Fourth, and her present Majesty, this appropriation only enduring for the life of the sovereign, in the spirit of the statute of Anne, st. 1, c. 7, s. 7, extended by the 1 & 2 Vict. c. 95, s. 4, which provides that the hereditary revenues of the Crown shall not be alienable for any term longer than the life of the king or queen making the grant.' Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, produce more and are better collected than 'they 'otherwise would,' and the public is 'consequently' a gainer; and upon the whole it is doubtless much better for the Crown, and also for the people, to have the revenue settled upon the modern footing rather than the ancient. For the Crown, because it is more certain, and collected with greater ease; for the people, because they are now delivered from the feudal hardships and other odious branches of the prerogative.

The expenses 'formerly' defrayed by the civil list 'were' those that in any shape relate to civil government; as the expenses of the royal household; the revenues allotted to the judges; all salaries to officers of state, and every of the sovereign's servants; the appointment to foreign ambassadors; the maintenance of the royal family; the sovereign's private expenses, or privy purse; and other very numerous outgoings, as secret service money, pensions, and other bounties, which sometimes 'have so' far exceeded the revenues appointed for that purpose, that application has been made to parliament to discharge the debts contracted on the civil list. Of the civil list. [334]

The civil list is indeed properly the whole of the sovereign's revenue in his own distinct capacity; the rest being rather the revenue of the public, or its creditors, though collected and distributed again, in the name and by the officers of the Crown: it now standing in the same place as the hereditary income did formerly; and, as that has gradually diminished, the parliamentary appointments have increased. The whole

revenue of Queen Elizabeth did not amount to more than 600,000*l.* a year; that of King Charles I. was 800,000*l.*, and the revenue voted for King Charles II. was 1,200,000*l.*, though complaints were made (in the first years at least) that it did not amount to so much. But it must be observed, that under these sums were included all manner of public expenses; among which Lord Clarendon in his speech to the parliament computed, that the charge of the navy and land forces amounted annually to 800,000*l.*, which was ten times more than before the former troubles. The same revenue, subject
[335] to the same charges, was settled on King James II.; but by the increase of trade, and more frugal management, it amounted on an average to a million and a half per annum (besides other additional customs, granted by parliament, which produced an annual revenue of 400,000*l.*), out of which his fleet and army were maintained at the yearly expense of 1,100,000*l.* After the Revolution, when the parliament took into its own hands the annual support of the forces both maritime and military, a civil list revenue was settled on the new king and queen, amounting, with the hereditary duties, to 700,000*l.* per annum; and the same was continued to Queen Anne and King George I. That of King George II., we have seen, was nominally augmented to 800,000*l.*, and in fact was considerably more: 'while that of his successor, George the Third, reached 1,030,000*l.*, besides sums voted by parliament for the discharge of debts. In the reign of William the Fourth various payments previously charged on the civil list, as the salaries of high and judicial officers and diplomatic pensions and salaries, were made directly chargeable on the consolidated fund; in consequence of which a sum under 400,000*l.* a year at present suffices for the maintenance of the royal family, and for the payment of such other sums as are still charged on the civil list. Indeed, the civil list annuities and pensions, diplomatic and other salaries, including the expenses attending the administration of law and justice, do not at present amount in the whole to one million annually, or less than one-fiftieth part of the total annual revenue of the kingdom, which now amounts, even in time of peace, to upwards of fifty millions. A moiety of that sum is required, as before stated, for the interest of the national debt; and the greater portion of the residue is applied to the maintenance of the army and navy.'

This finishes our inquiries into the fiscal prerogatives of the sovereign; or his revenue, both ordinary and extraordinary. We have therefore now chalked out all the principal outlines of this vast title of the law, the supreme executive magistrate, considered in his several capacities and points of view. But, before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power of the sovereign, or prerogative of the Crown, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting, and restraining this prerogative, have been made within the compass of little more than 'two centuries' past, from the Petition of Right in 3 Car. I. to the present time. So that the powers of the Crown are now to all appearance greatly curtailed and diminished since the reign of King James the First: particularly by the abolition of the Star-Chamber and High Commission courts in the reign of Charles the First, and by the disclaiming of martial law and the power of levying taxes on the subject by the same prince: by the disuse of forest laws for 'two centuries;' and by the many excellent provisions enacted under Charles the Second; especially the abolition of military tenures, purveyance, and pre-emption; the *Habeas Corpus* Act; and the Act to prevent the discontinuance of parliaments for above three years; and, since the Revolution, by the strong and emphatic words in which our liberties are asserted in the Bill of Rights and Act of Settlement; by the Act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the House of Commons; by rendering the seats of the judges permanent, and their salaries liberal and independent; and by restraining the royal pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the Crown is impoverished and stripped of all its ancient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we may perhaps be led to think, that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left to form that check upon the lords and commons, which the founders of our constitution intended. [336]

But, on the other hand, it is to be considered, that every prince, in the first parliament after his accession, has by long [337]

usage a truly royal addition to his hereditary revenue settled upon him for his life; and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence, which at his first accession seems, it must be owned, to be wanting. And then, with regard to power, we may find perhaps that the hands of government are at least sufficiently strengthened; and that an English monarchy is now in no danger of being overborne by either the nobility or the people. The instruments of power are not perhaps so open and avowed as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. In short, our national debt and taxes (besides the inconveniences before mentioned) have also in their natural consequences thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors, who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight established this system in their stead. The entire collection and management of so vast a revenue, being placed in the hands of the Crown, have given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation. Witness the commissioners and the multitude of dependents on the customs, in every port of the kingdom; the commissioners of excise, 'surveyors and collectors of the assessed, income, and land taxes,' and their numerous subalterns, in every inland district; the post-masters, and their servants, planted in every town, and upon every public road; and the commissioners of the stamps, and their distributors, which are full as scattered and full as numerous; all which are either mediately or immediately appointed by the Crown, and removable at pleasure without any reason assigned: these, it requires but little penetration to see, must give that power, on which they depend for subsistence, an influence most amazingly extensive. To this may be added the frequent opportunities of conferring particular obligations, by preference in money transactions, which will greatly increase this influence; and that over those persons whose attachment, on account of their wealth, is frequently the most desirable. All this is the natural, though

perhaps the unforeseen consequence of erecting our funds of credit, and to support them establishing our present perpetual taxes: the whole of which is entirely new since the Restoration in 1660; and by far the greatest part since the Revolution in 1688. And the same may be said with regard to the officers in our numerous army, and the places which the army has created. All which put together give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

But, though this profusion of offices should have no effect on individuals, there is still another branch of power; and that is, not the influence only, but the force of a disciplined army: paid indeed ultimately by the people, but immediately by the Crown: raised by the Crown, officered by the Crown, commanded by the Crown. They are kept on foot, it is true, only from year to year, and that by the power of parliament: but during that year they must, by the nature of our constitution, if raised at all, be at the absolute disposal of the Crown. And there need but few words to demonstrate how great a trust is thereby reposed in the prince by his people; a trust that is more than equivalent to a thousand little troublesome prerogatives.

Add to all this, that besides the civil list, the immense revenue which is annually paid to the creditors of the public is first deposited in the royal exchequer, and thence issued out to the respective offices of payment. This revenue the people can never refuse to raise, because it is made perpetual by Act of Parliament: which also, when well considered, will appear to be a trust of great delicacy and high importance.

Upon the whole therefore I think it is clear, that, whatever may have become of the *nominal*, the *real* power of the Crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired. The stern commands of prerogative have yielded to the milder voice of influence: the slavish and exploded doctrine of non-resistance has given way to a military establishment by law: and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue. When our national debts shall be lessened; when the posture of foreign affairs

will suffer our army to be thinned and regulated; and when our taxes shall be gradually reduced; this adventitious power of the Crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose. But till that shall happen, it will be our especial duty, as good subjects and good Englishmen, to reverence the Crown, and yet guard against corrupt and servile influence from those who are intrusted with its authority; to be loyal, yet free; obedient, and yet independent; and, above everything, to hope that we may long, very long, continue to be governed by a sovereign, who has ever manifested the highest veneration for our free constitution; and will therefore never harbour a thought, or adopt a persuasion, in any the remotest degree detrimental to public liberty.

CHAPTER IX.

OF SUBORDINATE MAGISTRATES.

In a former chapter of these Commentaries we distinguished magistrates into two kinds: supreme, or those in whom the sovereign power of the State resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only; namely, the supreme legislative power, or parliament; and the supreme executive power, which is the sovereign: and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.

And herein we are not to investigate the powers and duties of the great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like; because I do not know that they are in that capacity in any considerable degree the object of our laws, or have any very important share of magistracy conferred upon them, except that the secretaries of state are allowed 'in certain cases' the power of commitment in order to bring offenders to trial.[a] Neither shall I here treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice; because they will find a more proper place in the third part of these Commentaries. Nor shall I enter into any minute disquisitions, with regard to the rights and dignities of mayors and aldermen, or other magistrates of particular corporations; because these are mere [339] private and strictly municipal rights, depending upon the domestic constitution of their respective franchises, 'although controlled by general legislative provisions.' But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use, and have a jurisdiction and authority dispersedly throughout the

[a] 1 Leon. 70; 2 Leon. 175; Comb. 343; 5 Mod. 84; Salk. 347; Carth. 291.

kingdom, which are principally sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers 'and guardians' of the poor; in treating of all which I shall inquire into, first, their antiquity and origin; next, the manner in which they are appointed and may be removed; and lastly, their rights and duties. And first of sheriffs.

I. The antiquity and origin of the office.

I. The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words—scire gerefa, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes;* to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls, in process of time, by reason of their high employments and attendance on the person of the sovereign, not being able to transact the business of the county, were delivered of that burden;[b] reserving to themselves the honour, but the labour was laid on the sheriff. So that now the sheriff does all the sovereign's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to, the earl; the king, 'formerly' by his letters-patent 'but now by warrant under the hand of the clerk of the privy council,[c] committing *custodiam comitatus* to the sheriff, and him alone.

The mode of appointment.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by statute 28 Edw. I. c. 8, that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For anciently in some counties the sheriffs were hereditary; as I apprehend they were in Scotland till the statute 20 Geo. II. c. 43 'abolished heritable jurisdictions in that kingdom;' and so continued in the county of Westmoreland, 'until very recently;'[d] the city of London having also
[340] the inheritance of the shrievalty of Middlesex vested in their body by charter.[e] The reason of these popular elections is assigned in the same statute, c. 13, "that the commons might choose such as would not be a burden to them." And herein appears plainly a strong trace of the democratic part of our constitution; in which form of government it is an indis-

[b] Dalton, of Sheriffs, c. 1.
[c] 3 & 4 Will. IV. c. 99, s 3.
[d] 13 & 14 Vict. c. 30.
[e] 3 Rep. 72.

pensable requisite that the people should choose their own magistrates.[f] This election was in all probability not absolutely vested in the commons, but required the royal approbation. For in the Gothic constitution, the judges of the county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king; and the form of their election was thus managed; the people, or *incolæ territorii*, chose *twelve* electors, and they nominated *three* persons, *ex quibus rex unum confirmabat.*[g] But with us in England, these popular elections growing tumultuous, were put an end to by the statute 9 Edw. II. st. 2, which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges, as being persons in whom the same trust might with confidence be reposed. By statutes 14 Edw. III. c. 7, 23 Hen. VI. c. 8, and 21 Hen. VIII. c. 20, the chancellor, treasurer, president of the king's council, *chief* justices, and *chief* baron, are to make this election; and that on the morrow of All Souls in the exchequer. The statute of Cambridge, 12 Rich. II. c. 2, ordains that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs*, and other officers of the king, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most sufficient. And the custom now is (and has been at least ever [341] since the time of Fortescue,[h] who was chief justice and chancellor to Henry the Sixth), that all the judges, together with the other great officers and privy counsellors, meet in the exchequer (formerly on the morrow of All Souls, but now the morrow of St. Martin)[i] yearly; and then and there the judges propose three persons, to be reported (if approved of) to the sovereign, who afterwards appoints one of them to be sheriff.[j]

This custom of the judges proposing *three* persons seems borrowed from the Gothic constitution before mentioned; with

f Montesq. Sp. L. b. 2, c. 2.

g Stiern. de Jure Goth. l. 1, c. 3.

h De LL. c. 24.

i 24 Geo. II. c. 48.

j By virtue of the statute 8 & 9 Vict. c. 11, the sheriffs of the counties in Wales are assigned and appointed as in England.

this difference, that among the Goths the nominors were first elected by the people themselves. And this usage of ours, at its first introduction, I am apt to believe was founded upon some statute, though not now to be found among our printed laws; first, because it is materially different from the direction of all the statutes before mentioned; which it is hard to conceive that the judges would have countenanced by their concurrence, or that Fortescue would have inserted in his book, unless by the authority of some statute; and also because a statute is expressly referred to in the record, which Sir Edward Coke tells us[k] he transcribed from the council-book of 3 March, 34 Hen. VI., and which is in substance as follows. The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him; whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, Sir John Fortescue and Sir John Pricot, delivered the unanimous opinion of them all, "that the king did an error when he made a person "sheriff, that was not chosen and presented to him according "to the *statute;* that the person refusing was liable to no "fine for disobedience, as if he had been one of the *three* "persons chosen according to the tenor of the *statute;* that "they would advise the king to have recourse to the *three* "persons that were chosen according to the *statute;* or that "some other thrifty man be entreated to occupy the office for
[342] "this year; and that, the next year, to eschew such incon- "veniences, the order of the *statute* in this behalf made be "observed." But notwithstanding this unanimous resolution of all the judges of England, thus entered in the council-book, and the statute 34 & 35 Hen. VIII. c. 26, s. 61, which expressly recognised this to be the law of the land, some of our writers[l] have affirmed, that the king, by his prerogative, may name whom he pleases to be sheriff, whether chosen by the judges or no. This is grounded on a very particular case in the fifth year of Queen Elizabeth, when, by reason of the plague, there was no Michaelmas term kept at Westminster; so that the judges could not meet there *in crastino animarum* to nominate the sheriffs; whereupon the queen named them herself, without such previous assembly, appointing for the

[k] 2 Inst. 559. [l] Jenkins, 229.

most part one of the two remaining on the last year's list.[m] And this case, thus circumstanced, is the only authority in our books for the making these extraordinary sheriffs. It is true, the reporter adds, that it was held that the queen, by her prerogative, might make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium;* but the doctrine of *non obstante's,* which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated Westminster Hall when King James abdicated the kingdom.[n] However, it must be acknowledged, that the practice of occasionally naming what are called pocket-sheriffs, by the sole authority of the Crown, has uniformly continued to the present time; 'although this has only occurred *occasionally,* as on the death of the existing sheriff during his year of office.'

Duration of his office. Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year: and yet it has been said[o] that a sheriff may be appointed *durante bene placito,* or during the king's pleasure. Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the Crown; in which last case it was usual for the successor to send a new writ to the old sheriff;[p] but now by statute 1 Ann. st. 1, c. 8, all officers appointed by [343] the preceding sovereign, may hold their offices for six months after the demise of the Crown, unless sooner displaced by the successor. We may further observe, that by statute 1 Rich. II. c. 11, no man that has served the office of sheriff for one year, can be compelled to serve the same again within three years after.

His power and duty. We shall find it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as a judge, as the keeper of the peace, as a ministerial officer of the superior courts of justice, or as the bailiff of the sovereign.

As judge. In his judicial capacity he 'formerly' heard and determined all cases of forty shillings value and under, in his county court; and he has now a judicial power in divers other civil cases;[q]

[m] Dyer, 225.

[n] 'Charles I., before summoning the Long Parliament, appointed seven of the leading patriots sheriffs, in order to prevent their being returned to parliament.'

[o] 4 Rep. 32; Dalt. of Sheriffs, 8.

[p] Dalt. 7.

[q] Dalt. c. 4.

'as on writs of trial in actions in the superior courts where the plaintiff's claim does not exceed 20*l.*; and on writs of inquiry to assess damages in undefended suits; and in assessing the compensation to be paid to the owners for lands taken for making railways and other public works.' The sheriff is likewise to decide the elections of knights of the shire (subject to the control of the House of Commons), of coroners, and of verderors; and to return such as he shall determine to be duly elected.

As keeper of the peace.

As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office.[r] He may apprehend and commit to prison all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the peace. He may, and is bound, *ex officio*, to pursue, and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the queen's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county;[s] and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning,[t]
[344] under pain of fine and imprisonment.[u] But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the Great Charter, he, together with the constable, coroner, and certain other officers of the sovereign, are forbidden to hold any pleas of the Crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office;[v] for this would be equally inconsistent, he being in many respects the servant of the justices.

As ministerial officer.

In his ministerial capacity, the sheriff is bound to execute

[r] 1 Roll. Rep. 237.
[s] Dalt. c. 95.
[t] Lamb. Eiren. 315.
[u] Stat. 2 Hen. V. c. 8.
[v] Stat. 1 Mar. st. 2, c. 8.

all process issuing from the superior courts of justice. In civil causes, 'where the defendant is held to bail on the ground of being about to leave England,' he is to serve the writ, to arrest, and to take bail, 'or the deposit in lieu of bail;' when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also has power to arrest and imprison; he returns the jury; he has the custody of the delinquent; and he executes the sentence of the court, though it extend to death itself.

As the bailiff of the sovereign, it is his business to preserve the rights of the Crown within his bailiwick, for so his county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whose territory was formerly divided into bailiwicks, as that of England into counties.[w] He must seize to the sovereign's use all lands devolved to the Crown by attainder or escheat; must levy all fines and forfeitures,[x] and must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject. As bailiff of the Crown.

To execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*.[y] [345]

The under-sheriff, 'who must be nominated by the sheriff within one month after his own appointment,'[z] usually performs all the duties of the office; a very few only excepted, where the personal presence of the high-sheriff is necessary. But no under-sheriff shall abide in his office above one year;[a] and if he does, by statute 23 Hen. VI. c. 8, he forfeits 200*l*., a very large penalty in those early days. Formerly no under-sheriff or sheriff's officer could practise as an attorney during the time he continued in such office.[b] But these regulations were evaded, by practising in the names of other attornies, and putting in sham deputies by way of nominal under-sheriffs; 'and the restriction is now removed.'[c] Under-sheriff.

Bailiffs, or sheriff's officers, are either bailiffs of hundreds, Bailiffs.

[w] Fortesc. de LL. c. 24.
[x] 3 & 4 Will. IV. c. 99.
[y] Stat. 3 Geo. I. c. 15.
[z] 3 & 4 Will. IV. c. 99, s. 5.
[a] Stat. 42 Edw. III. c. 9.
[b] Stat. 1 Hen. V. c. 4.
[c] 6 & 7 Vict. c. 73.

or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein, to summon juries, to attend the judges and justices at the assizes and quarter sessions, and also to execute writs and process in the several hundreds. But, as these are generally plain men, and not thoroughly skilful in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them, who are generally mean persons employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey. The sheriff being answerable for the misdemeanors of these bailiffs, 'when acting under his special authority;'[d] they are therefore usually bound in an
[346] obligation with sureties for the due execution of their office, and thence are called bound-bailiffs, which the common people have corrupted into a much more homely appellation.

Gaolers. Gaolers are also the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant: and, if they suffer any such to escape, the sheriff shall answer it to the sovereign, if it be a criminal matter; or, in a civil case, to the party injured.[e] And to this end the sheriff must have lands sufficient within the county to answer the king and his people.[f] The abuses of gaolers and sheriff's officers, toward the unfortunate persons in their custody, were restrained and guarded against by statute 32 Geo. II. c. 28, 'which Act has been superseded, however, by a number of subsequent statutes, regulating gaols according to the class of persons or offenders confined in them, and establishing visiting justices and government inspectors of prisons.'

The vast expense, which custom had introduced in serving the office of high sheriff, was grown such a burden to the subject, that it was enacted, by statute 13 & 14 Car. II. c. 21, (made perpetual 1 Jac. II. c. 17), that no sheriff (except of London, Westmoreland, and towns which are counties of themselves,) should keep any table at the assizes, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery; yet, for the sake of safety

[d] *Drake* v. *Sykes*, 7 T. R. 113.
[e] Dalt. c. 118; 4 Rep. 34.
[f] Stat. 9 Edw. II. st. 2; 2 Edw. III. c. 4; 4 Edw. III. c. 9; 5 Edw. III. c. 4.

and decency, he may not have less than twenty men in England and twelve in Wales; upon forfeiture, in any of these cases, of 200*l.*

II. Coroner. The antiquity and origin of the office.

II. The coroner's is also a very ancient office at the common law. He is called coroner, *coronator*, because he has principally to do with pleas of the Crown, or such wherein the sovereign is more immediately concerned.[g] And in this light the lord chief justice of the queen's bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm.[h] But there are also particular coroners for every county of England. 'Formerly the number of them was' usually four, but sometimes six, and sometimes fewer:[i] 'most counties, however, are now divided into districts for this purpose, under the statute 7 & 8 Vict. c. 92; and although coroners elected for such districts are coroners for the whole county, yet they hold inquests, except in cases of emergency, only in their own districts.' This officer[j] is of equal antiquity with the sheriff, and was ordained together with him to keep the peace, when the earls gave up the wardship of the county. [347]

The mode of appointment.

He is still chosen[k] by the freeholders in the county court ('except where the county is divided into districts, when he is chosen at some place within the district by the freeholders of the county resident in such district'), as by the policy of our ancient laws the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people;[l] and as verderors of the forest also were, whose business it was to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law, *de coronatore eligendo:*[m] in which it is expressly commanded the sheriff, "*quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*" And in order to effect this the more surely, it was enacted by the statute of Westminster I. (3 Edw. I. c. 10), that none but lawful and discreet knights should be chosen; and there was an instance in the 25 Edw. III. of a man being

[g] 2 Inst. 31; 4 Inst. 271.

[h] 4 Rep. 57.

[i] F. N. B. 163.

[j] Mirror, c. 1, § 3.

[k] 'The election of county coroners is regulated by statute 7 & 8 Vict. c. 92.'

[l] 2 Inst. 558.

[m] N. N. B. 163.

removed from this office because he was only a merchant.[n] But subsequently it was thought sufficient if a man had lands enough to be made a knight, whether he were really knighted or not:[o] for the coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour;[p] and if he has not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer.[q] Now, indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands; so that, although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid statute of Westminster I. expressly forbidden to take a reward, under pain of a great forfeiture to the Crown, yet for many years past they have only desired to be chosen for the sake of their perqui-
[348] sites; being allowed fees for their attendance by the statute 3 Hen. VII. c. 1, which Sir Edward Coke complains of heavily,[r] though since his time those fees have been much enlarged,[s] 'and are now fixed by the court of quarter sessions, and are paid out of the county rate.'[t]

'In boroughs which have a separate court of quarter sessions, the council appoints and pays a fit person to be coroner for the borough.[u] In other boroughs the coroner of the county has jurisdiction.'

Duration of his office.

The coroner is chosen for life; but may be removed, either by being made sheriff, which is an office incompatible with the other, or by writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, has not a sufficient estate in the county, or lives in an inconvenient part of it.[v] By the statute 25 Geo. II. c. 29, extortion, neglect, or misbehaviour, are also made causes of removal.

His power, and duty.

The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial, but principally judicial. This is in a great measure ascertained by statute 4 Edw. I.,

[n] 2 Inst. 32.
[o] F. N. B. 163, 164.
[p] F. N. B. 163, 164.
[q] Mirr. c. 1, § 3; 2 Inst. 175.
[r] 2 Inst. 210.
[s] Stat. 25 Geo. II. c. 29.
[t] See the statute 7 Will. IV. and 1 Vict. c. 68.
[u] 5 & 6 Will. IV. c. 76.
[v] F. N. B. 163, 164; 4 Inst. 271.

de officio coronatoris: and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis:*" for, if the body be not found, the coroner cannot sit.[w] He must also sit at the very place where the death happened, 'but he has jurisdiction although the cause of death happened out of his county or district;'[x] and his inquiry is made by a jury 'of twelve at least,'[y] from four, five, or six of the neighbouring towns, over whom he is to preside. 'He may require the attendance of medical witnesses or assessors, and order a *post mortem* examination of the body.'[z] If any be found guilty by this inquest of murder or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby.[a] He must certify this inquisition (under his own seal and the seals of his jurors),[b] together with the evidence thereon,[c] to the Court of Queen's Bench, or the [349]
next assizes.

Another branch of his office is to inquire concerning shipwrecks, and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure; "and that may be well perceived (saith the old statute "of Edw. I.) where one liveth riotously, haunting taverns, and "hath done so of long time;" whereupon he might be attached, and held to bail, upon this suspicion only. Shipwrecks.

'The coroners may appoint fit and proper persons to act for them as deputies in the holding of inquests, subject however to the lord chancellor's approval of such appointment; and the coroner may at any time revoke such appointment.'[d] Deputy Coroner.

[w] Thus, in the Gothic constitution, before any fine was payable by the neighbourhood for the slaughter of a man therein, "*de corpore delicti constare oportebat; i. e., non tam fuisse aliquem in territorio isto mortuum inventum, quam vulneratum et cæsum. Potest enim homo etiam ex aliâ causâ subito mori.*" (Stiernhook, de Jure Gothor. l. 3, c. 4.)

[x] 6 Vict. c. 12.

[y] 2 Hales, P. C. 161, n.

[z] 6 & 7 Will. IV. c. 89; 7 Will. IV. and 1 Vict. c. 68.

[a] 'Before deodands were abolished by the stat. 9 & 10 Vict. c. 62, he must have inquired also whether it were homicide or not, and whether any deodand had accrued by the death.'

[b] Stat. 33 Hen. VIII. c. 12; 1 & 2 Ph. & M. c. 13.

[c] 7 Geo. IV. c. 64, s. 4.

[d] 6 & 7 Vict. c. 83.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant), the process must be then awarded to the coroner, instead of the sheriff, for execution of the king's writs.[e]

III. Justices of the peace. The antiquity and origin of the office.

III. The next species of subordinate magistrates that we have to consider are justices of the peace; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The common law has ever had a special care and regard for the conservation of the peace, for peace is the very end and foundation of civil society. And, therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute officii* still continue, but the latter sort are superseded by the modern justices.

The queen's majesty[f] is, by her office and dignity royal, the principal conservator of the peace within all her dominions;
[350] and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the queen's (or king's) peace. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, the lord high constable of England (when any such officers are in being), and all the justices of the court of queen's bench (by virtue of their offices), and the master of the rolls (by prescription), are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it:[g] the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county,[h] as is also the sheriff;[i] and both of them may take a recognizance or security for the peace. Constables, tything-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend

[e] 4 Inst. 271.
[f] Lambard, Eirenarch. 12.
[g] Lamb. 12.
[h] Britton. 3.
[i] F. N. B. 81.

all breakers of the peace and commit them, till they find sureties for their keeping it.[j]

The mode of appointment.

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription,[k] or were bound to exercise it by the tenure of their lands;[l] or, lastly, were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis.*"[m] But when Queen Isabel, the wife of Edward II., had contrived to depose her husband by a forced resignation of the Crown, and had set up his son, Edward III., in his place; this, being a thing then without example in England, it was feared would much alarm the people; especially as the old king was living, though hurried about from castle to castle, till at last he met with an untimely death. To prevent therefore any risings, or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of which is preserved by Thomas Walsingham,[n] giving a plausible account of the manner of his obtaining the Crown; to wit, [351] that it was done *ipsius patris bene placito;* and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinheritance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament[o] that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers to evil, or barretors in the country, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people and given to the king;[p] this assignment being construed to be by the king's commission.[q] But still they were called only conservators, wardens, or keepers of the peace, till the statute 34 Edward III. c. 1, gave them the power of trying felonies; and then they acquired the more honourable appellation of justices.[r]

These justices are appointed by special commission under the great seal, the form of which was settled by all the judges,

[j] Lamb. 14.
[k] Lamb. 15.
[l] Lamb. 17.
[m] Lamb. 16.
[n] Hist. A.D. 1327.
[o] Stat. 1 Edw. III. st. 2, c. 16.
[p] Lamb. 20.
[q] Stat. 4 Edw. III. c. 2; 18 Edw. III. st. 2, c. 2.
[r] Lamb. 23.

A. D. 1590.[s] This appoints them all,[t] jointly and separately, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors: in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence: the words of the commission running thus, "*quorum aliquem vestrum A.B.C.D. &c., unum esse volumus;*" whence the persons so named are usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum;* but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person for the sake of propriety; and no exception is allowable, for not expressing in the form of warrants, &c., that
[352] the justice who issued them is of the *quorum*.[u] When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem*, from the clerk of the Crown in chancery, empowering certain persons therein named to administer the usual oaths to him, which done, he is at liberty to act.

Their number and qualifications.

Touching the number and qualifications of these justices; it was ordained by statute 18 Edw. III. c. 2, that *two* or *three* of the best reputation in each county shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. III. c. 1 that one lord, and three or four of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by statute 12 Rich. II. c. 10, and 14 Rich. II. c. 11, to restrain them, at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago),[v] that the growing number of statute laws, committed from time

[s] Lamb. 43.

[t] See the form itself, Lamb. 35; Burn, tit. *Justices*, § 1.

[u] 26 Geo. II. c. 27; 7 Geo. III. c. 21. The stat. 4 Geo. IV. c. 27, also enacts that in all cases where the number of justices in any city, town, or other place is limited, and only one or more of such justices is or are of the *quorum*, all acts, orders, &c., of any two or more of such justices shall be valid, though neither of them shall happen to be of the *quorum*.

[v] Lamb. 34.

to time to the charge of justices of the peace, have occasioned also (and very reasonably) their increase to a larger number. And, as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county: and the statute 13 Rich. II. st. 1, c. 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. V. st. 1, c. 4, and st. 2, c. 1, they must be resident in their several counties. 'Nevertheless a justice for two adjoining counties may act for one while residing or being in the other.' [w] And because, contrary to the old statutes above mentioned, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11, that no justice should be put in commission if he had not lands to the value of 20*l.* per annum. And the rate of money being greatly altered since that time, it was enacted by statutes 5 Geo. II. c. 18, 'and 18 Geo. II. c. 20,' that every justice, 'acting for a county' (except 'such privileged persons' as are therein excepted), shall have 100*l.* per annum clear of all deductions, 'or a reversion or remainder with reserved rents amounting to 300*l.* per annum,' and if he acts without such qualification he shall forfeit 100*l.* This qualification is almost [353] an equivalent to the 20*l.* per annum required in Henry the Sixth's time; and of this the justice must now make oath. Finally it was provided by the Act 5 Geo. II., 'which is re-enacted in substance by the statute 6 & 7 Vict. c. 73,' that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace.[x]

As the office of these justices is conferred by the Crown, so it subsists only during the pleasure of the sovereign, and is determinable, 1. By the demise of the Crown; that is, in six months after.[y] But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh:[z] nor, by reason of any new commission, to take the oaths more than once in the same reign.[a] 2. By express writ under the great

[w] 11 & 12 Vict. c. 42. s. 5.

[x] 'The statute 6 & 7 Vict., c. 73, contains a proviso, that it shall not extend to any city or town being a county of itself, or to any city, town, cinque port, or liberty, having justices of the peace within their respective limits and precincts by charter, commission, or otherwise.'

[y] Stat. 1 Ann. c. 8.

[z] Stat. 1 Geo. III. c. 13.

[a] Stat. 7 Geo. III. c. 9.

seal,[b] discharging any particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it, seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession of the office of sheriff or coroner.[c] Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission: but now[d] it is provided, that notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

Their power, office, duty, and liability.

The power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives
[354] him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences; which is the ground of their jurisdiction at sessions, of which more will be said in its proper place. And as to the powers given to one, two, or more justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without sinister views of his own will engage in this troublesome service. And therefore, if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office;[e] which, among other privileges, prohibit such justices from being sued for any oversight, without notice

[b] Lamb. 67.

[c] Stat. 1 Mar. st. 2, c. 8.

[d] Stat. 1 Edw. VI. c. 7.

[e] Stat. 7 Jac. I. c. 5; 21 Jac. I. c. 12; 24 Geo. II. c. 44. 'See now the statute 11 & 12 Vict. c. 44.'

beforehand; and stop all suits began, on tender made of sufficient amends. But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to 'full costs of suit as between attorney and client.'[f]

It is impossible, upon our present plan, to enter minutely into the particulars of the accumulated authority thus committed to the charge of these magistrates. I must therefore refer myself at present to such subsequent part of these Commentaries as will in their turns comprise almost every object of the justice's jurisdiction.[g]

I shall next consider some officers of lower rank than those which have gone before, and of more confined jurisdiction; but still such as are universally in use through every part of the kingdom. [355]

IV. Constables. The antiquity and origin of the office.

IV. Fourthly, then, of the constable. The word *constable* is frequently said to be derived from the Saxon koning-stapel, and to signify the support of the king. But as we borrowed the name as well as the office of constable from the French, I am rather inclined to deduce it, with Sir Henry Spelman and Dr. Cowell, from that language: wherein it is plainly derived from the Latin *comes stabuli,* an officer well known in the empire: so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback. This great office of lord high constable has been disused in England, except only upon great and solemn occasions, as the king's coronation and the like, ever since the attainder of Stafford Duke of Buckingham, under King Henry VIII.; as in France it was

[f] 'The principal statute is the Act 11 & 12 Vict. c. 44. As to the notice required, and the time within which actions against justices must be brought, see vol. iii. pp. 335, 336.'

[g] 'Sir William Blackstone here' recommends to the student the perusal of Mr. Lambard's *Eirenarcha,* and Dr. Burn's *Justice of the Peace;* wherein he will find everything relative to this subject, both in ancient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method. 'The former work, however valuable as an authority, is practically obsolete; while Burn's Justice, although a valuable work of reference, is by no means adapted, in its present form, to the perusal of students.'

suppressed about a century after by an edict of Louis XIII.:[h] but from his office, says Lambard,[i] this lower constableship was at first drawn and fetched, and is as it were a very finger of that hand. For the statute of Winchester,[j] which 'is the first legislative provision respecting' them,[k] directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to *arms* and *armour*.

The constables 'we are now speaking of' are of two sorts, high constables and petty constables. The *former* were first ordained by the statute of Winchester, as before mentioned; are appointed at the court-leets of the franchise or hundred over which they preside, or, in default of that, by the justices 'at a special sessions, under the statute 7 & 8 Vict. c. 33.' They are removable by the same authority that appointed them.[l] The *petty* constables are inferior officers in every town and parish subordinate to the high constable of the hundred, first
[356] instituted about the reign of Edward III.[m] These petty constables have two offices united in them: the one ancient, the other modern. Their ancient office is that of head-borough, tithing-man, or borsholder; of whom we formerly spoke, and who are as ancient as the time of King Alfred; their more modern office is that of constable merely; which was appointed (as was observed) so lately as the reign of Edward III., in order to assist the high constable.[n] And in general, the ancient head-boroughs, tithing-men, and borsholders, were made use of to serve as petty constables; though not so generally, but that in many places they still continue distinct officers from the constable. They were all chosen by the jury at the court-leet; or if no court-leet was held, were appointed by two justices of the peace.[o] 'Now, however, parish constables are chosen by the justices at a petty sessions holden yearly for that purpose in every petty sessional division, from lists of qualified persons made out by the overseers.'[p]

Their power, duty, and liability.

The general duty of all constables, both high and petty, as well as of the other officers, is to keep the peace in their

Philips' Life of Pole, ii. 111.
Of constables, 5.
13 Edw. I. c. 6.
Salk. 175, 180.
Salk. 150.
Spelm. Gloss. 148.

[n] Lamb. 9.
[o] Stat. 14 & 15 Car. II. c. 12.
[p] 'See the statute 5 & 6 Vict. c. 109, extended and amended by the statutes 7 & 8 Vict. c. 52, and 13 & 14 Vict. c. 20.'

several districts; and to that purpose they are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like: of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance. One of their principal duties, arising from the statute of Winchester, which appoints them, is to keep watch and ward in their respective jurisdictions. Ward-guard, or *custodia*, is chiefly applied to the daytime, in order to apprehend rioters, and robbers on the highways; the manner of doing which is left to the discretion of the justices of the peace and the constable:[q] the hundred being however answerable for all robberies committed therein by daylight, for having kept negligent guard. Watch is properly applicable to the night only (being called among our Teutonic ancestors *wacht* or *wacta*),[r] and it begins at the time when ward ends, and ends when that begins: for by the statute of Winchester, in walled [357] towns the gates shall be closed from sun-setting to sun-rising, and watch shall be kept in every borough and town, especially in the summer season, to apprehend all rogues, vagabonds, and night-walkers, and make them give an account of themselves. The constable may appoint watchmen, at his discretion, regulated by the custom of the place; and these being his deputies, have for the time being the authority of their principal.[s] 'A protection, similar to that provided by the legislature for magistrates unintentionally exceeding their authority, is also provided for constables.'[t]

Special constables.

'Besides these parish constables appointed annually, power is given to justices of the peace upon information that disturbances exist or are apprehended, to appoint and swear-in *special* constables from among the persons qualified to fill the office of parish constable. One of the Secretaries of State may, however, on the representation of the justices, order

[q] Dalt. Just. c. 104.

[r] *Excubias et explanationes quas wactas vocant.* Capitular. Ludov. Pii. c. 1, A.D. 815.

[s] With regard to the infinite number of minute duties that are laid upon constables by a diversity of statutes, I must again refer to Mr. Lambard and Dr. Burn; in whose compilations may be also seen what powers and duties belong to the constable or tithingman indifferently, and what to the constable only, for the constable may do whatever the tithingman may; but it does not hold *e converso*, the tithingman not having an equal power with the constable.

[t] See vol. iii. pp. 335, 336.

persons to be sworn in though exempt by law from so serving.[u]

The police force.

'Besides these ancient officers, we are next to notice the police force now established throughout England and Wales. The old system of the watchmen appointed, as already mentioned, having been long found insufficient in towns, a system of police was established in the Metropolis at the close of the reign of George the Fourth;[v] and similar peace officers have been subsequently established in various large towns, either by special Acts of Parliament passed for that purpose, with the aid of the Town Police Clauses Act, 1847,[w] or by force of the several provisions of the Lighting and Watching Act (3 & 4 Will. IV. c. 90), or in the case of boroughs, under the Municipal Corporation Act (5 & 6 Will. IV. c. 76). The parish constables having been also found unequal for the due preservation of peace, and the suppression of crime in many counties, power was given by the statutes 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, to the justices of the peace for any county, assembled in general or quarter sessions, to report to one of Her Majesty's Secretaries of State, that the ordinary officers appointed for preserving the peace were not sufficient for that purpose, and the protection of the inhabitants and the security of property within the county, and stating how many constables were needed for those purposes, not exceeding one man for every thousand inhabitants. General rules for the government, pay, clothing, and accoutrements of the constables, being then furnished by the Secretary of State, the justices may proceed (subject to his approval) to appoint a chief constable for the county, or for each parliamentary division thereof, the chief constable then appointing (subject to the approval of two or more justices in petty sessions) the other constables, and a superintendent to be at the head of the constables in each division; the whole, when sworn in, having all the powers, privileges, and duties which any constable duly appointed has within his constablewick by virtue of the common law or of any statute. By the recent statute (19 & 20 Vict. c. 69), the discretionary power of adopting the act is taken away,

[u] See 1 & 2 Will. IV. c. 41; 5 & 6 Will. IV. c. 43; and as to constables appointed to keep the peace near public works, 1 & 2 Vict. c. 80.

[v] See the statute 10 Geo. IV. c. 44; 2 & 3 Vict. c. 47; and 2 & 3 Vict. c. xciv. (local and personal).

[w] 10 & 11 Vict. c. 89.

and the justices of every county in which a constabulary has not been already established for the whole of such county, under the above Acts, are directed at the general or quarter sessions holden next after the 1st of December, 1856, to proceed to establish a sufficient police force for the whole of such county, or where a constabulary is already established for a part of it, then for the rest of such county.'

'Various provisions are made by these statutes for the distribution, in certain cases, of the police force, according to the requirements of particular districts, and for consolidating the police of boroughs with those of the county, and giving the officers of each co-extensive powers. The justices are required to report to one of the Secretaries of State as to the number of offences, the number of persons apprehended, and other matters relating to the state of crime, and power is given to her Majesty to appoint three persons as inspectors, to visit and inquire into the state and efficiency of the police in every county.'

'The police force, thus established, is paid by means of a police-rate made by the justices of the county assembled in general or quarter sessions, and levied with the county-rate. Upon the certificate, however, of one of the Secretaries of State, that the police of any county or borough has been maintained in a state of efficiency in point of numbers and discipline for the previous year, the Commissioners of the Treasury are empowered to contribute towards the expenses of such police, a sum not exceeding one-fourth of the charge for their pay and clothing.'

V. We are next to consider the surveyors of the highways. Every parish is bound of common right to keep the high-roads, that go through it, in good and sufficient repair; unless, by reason of the tenure of lands or otherwise, this care is consigned to some particular private person. From this burden no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas* to which every man's estate was subject; viz., *expeditio contra hostem, arcium constructio, et pontium reparatio.* For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum,*

V. Surveyors of highways.

nullisque dignitatis ac venerationes meritis, cessare oportet.[x] And indeed now, for the most part, the care of the roads only seems to be left to parishes; that of bridges being in great measure devolved upon the county at large, by statute 22 Hen. VIII. c. 5.[y] If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect: but it was not then incumbent on any particular officer to call the parish together, and set them upon
[358] this work; for which reason, by the statute 2 & 3 Ph. & M. c. 8, surveyors of the highways were ordered to be chosen in every parish.[z]

Origin of the office.

These surveyors were originally, according to the statute of Philip and Mary, to be appointed by the constable and churchwardens of the parish; but 'they are now chosen annually by the inhabitants, and if the inhabitants omit to elect, the justices may appoint them, under the regulations prescribed by the statute 5 & 6 Will. IV. c. 50. Parishes also may be united into a district, having one district surveyor.'

Their office and duty.

Their office and duty consists in putting in execution a variety of laws for the repairs of the public highways, that is, of ways leading from one town to another; all which 'laws were consolidated and amended by the above-mentioned statute 5 & 6 Will. IV. c. 50.[a] Under that statute the surveyors have full powers to get materials and contract for getting and conveying them; and also to remove and compel the removal of nuisances, the cutting of trees, and the opening of ditches and drains,[b] and the impounding of cattle straying on the roads. Cartways are required to be twenty feet wide; horse-

[x] C. 11, 74, 4.

[y] 'The jurisdiction of the court of quarter sessions over the building and repair of county bridges has been regulated by the statutes 14 Geo. II. c. 33, s. 1; 43 Geo. III. c. 59; 52 Geo. III. c. 110; 54 Geo. III. c. 90; 55 Geo. III. c. 143; 5 & 6 Will. IV. c. 50, ss. 21, 22; and 4 & 5 Vict. c. 49. As to bridges in boroughs, see 13 & 14 Vict. c. 64.'

[z] This office, Mr. Dalton (Just. cap. 50) says, exactly answers that of the *curatores viarum* of the Romans; but it should seem that theirs was an office of rather more dignity and authority than ours; not only from comparing the method of making and amending the Roman ways with those of country parishes, but also because one Thermus, who was the curator of the Flaminian way, was candidate for the consulship with Julius Cæsar. (Cic. ad Attic. l. 1, ep. 1.)

[a] 'Amended and extended as to railway companies and railway crossings by 2 & 3 Vict. c. 45; 5 & 6 Vict. c. 55, s. 9; and 8 & 9 Vict. c. 20, s. 47; as to getting soil and materials from private lands, by 4 & 5 Vict. c. 51; and as to sale of parish lands by 8 & 9 Vict. c. 71.'

[b] See also 11 & 12 Vict. c. 123, s 6.

ways eight feet; and footways three feet. Various regulations are to be observed by persons driving along the roads, and penalties are imposed for their infraction, and also on surveyors guilty of negligence or breach of duty. Provision is likewise made for stopping up and diverting highways where unnecessary or inconvenient, as well as for compelling their repair. To provide for the expense of the maintenance of the highways, the surveyors are empowered to levy a rate in the same manner and on the same persons and property as in the case of rates for the relief of the poor.'[c] As for turnpikes, [359] which are now pretty generally introduced in aid of such rates, and the law relating to them, these depend principally on the particular powers granted in the several road Acts, and upon some general provisions, which are extended to all turnpike roads in the kingdom, by statute '3 Geo. IV. c. 126,' amended by many subsequent Acts.[d]

'Owing, however, to the general introduction of railways, the tolls taken on turnpike roads have been so reduced in amount, that the justices are now authorised to apply a portion of the highway rates to the turnpike roads, on proof that the funds of any turnpike trust are deficient for that purpose.'[e]

VI. Overseers and Guardians of the Poor.

VI. I proceed, therefore, lastly, to consider the overseers and guardians of the poor; their origin, appointment, and duty.

Antiquity and origin of the office.

The poor of England, till the time of Henry VIII., subsisted entirely upon private benevolence, and the charity of well-disposed Christians. For though it appears by the Mirror, that by the common law the poor were to be "sustained by "parsons, rectors of the church, and the parishioners, so that "none of them die for default of sustenance;" and though by

[c] 'All streets being or becoming highways within any district to which the Public Health Act, 1848, is applied, are vested in and under the management and control of the Local Board of Health (11 & 12 Vict. c. 63; and 15 & 16 Vict. c. 42, s. 13). Moreover, various local Acts, incorporating "The Towns' Improvement Clauses Act, 1847" (10 & 11 Vict. c. 34), give power over highways to the commissioners named in the Acts.'

[d] '4 Geo. IV. cc. 16, 35, & 95; 5 Geo. IV. c. 69; 7 Geo. IV. c. 64; 7 & 8 Geo. IV. cc. 24 & 30; 9 Geo. IV. c. 77; 1 & 2 Will. IV. c. 25; 4 & 5 Will. IV. c. 81; 5 & 6 Will, IV. c. 18; 2 & 3 Vict. c. 46; 3 & 4 Vict. c. 39; 4 & 5 Vict. cc. 33, 51; 12 & 13 Vict. c. 46; 14 & 15 Vict. c. 38. As to turnpike roads in South Wales, 7 & 8 Vict. c. 91, amended by 8 & 9 Vict. c. 61; 10 & 11 Vict. c. 72; and 14 & 15 Vict. c. 16, s. 1; 17 & 18 Vict. c. 7. Turnpike Acts are generally only passed for a certain term of years; but an annual Act is now usually passed for their continuation. (19 & 20 Vict. c. 49.)'

[e] 17 & 18 Vict. c. 52.

the statute 12 Rich. II. c. 7, and 19 Hen. VII. c. 12, the poor are directed to abide in the cities or towns wherein they were born, or such wherein they had dwelt for three years (which seems to be the first rudiments of parish settlements), yet till the statute 27 Hen. VIII. c. 25, I find no compulsory method chalked out for this purpose; but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and among other bad effects which attended the monastic institutions, it was not perhaps one of the least (though frequently esteemed quite otherwise) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms
[360] at the gates of the religious houses. But, upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom; and abundance of statutes were made in the reign of King Henry the Eighth and his children, for providing for the poor and impotent, which, the preambles to some of them recite, had of late years greatly increased. These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing to exercise any honest employment. To provide in some measure for both of these, in and about the metropolis, Edward the Sixth founded three royal hospitals: Christ's and St. Thomas's, for the relief of the impotent through infancy or sickness; and Bridewell, for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large; and therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2, overseers of the poor were appointed in every parish.

The mode of appointment.

By the statute last mentioned, these overseers were to be nominated yearly in Easter week, or within one month after, by two justices dwelling near the parish; 'but now by the statute 54 Geo. III. c. 91, the appointments are to be made within fourteen days after the 25th day of March in each year.' The overseers must be substantial householders, and so expressed to be in the appointment of the justices.[f]

[f] 2 Lord Raym. 1394.

Their office and duty, according to the same statute, are principally these: first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other being poor and not able to work; and secondly, to provide work for such as are able, and cannot otherwise get employment. For these joint purposes they are empowered to make and levy rates upon the several inhabitants of the parish, by the same Act of Parliament; which has been farther explained and enforced by several subsequent statutes. [361]

Their office and duty.

The two great objects of this statute seem to have been, 1. To relieve the impotent poor, and them only. 2. To find employment for such as are able to work; and this principally by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common workhouse.[g]

Its only defect was confining the management of the poor to small parochial districts, which are frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had; none being obliged to reside in the places of their settlement but such as were unable or unwilling to work, and those places of settlement being only such where they were *born*, or had made their *abode*, originally for three years, and afterwards (in the case of vagabonds) for one year only.

After the Restoration a very different plan was adopted, which rendered the employment of the poor more difficult, by authorising the subdivision of parishes; greatly increased their number, by confining them all to their respective dis- [362]

g 'Sir William Blackstone condemns the workhouse system of his day as' a practice which put the sober and diligent upon a level (in point of their earnings) with those who were dissolute and idle, depressed the laudable emulation of domestic industry and neatness, and destroyed all endearing family connexions, the only felicity of the indigent. If none were relieved, 'continues the learned commentator,' but those who are incapable to get their livings, and that in proportion to their incapacity; if no children were removed from their parents but such as are brought up in rags and idleness; and if every poor man and his family were regularly furnished with -mplayment, and sllowed the whole profits of their la&our, a spirit of busy cheerfulness would soon diffuse itself through every cottage; work would become easy and habitual, when absolutely necessary for daily subsistence; and the peasant would go through his task without a murmur, if assured that he and his children (when incapable of work through infancy, age, or infirmity), would then, and then only, be entitled to support from his opulent neighbours.

tricts; gave birth to the intricacy of our poor laws, by multiplying and rendering more easy the methods of gaining settlements; and, in consequence, created an infinity of expensive lawsuits between contending neighbourhoods concerning those settlements and removals.

Law of settlement.

By the statute 13 & 14 Car. II. c. 12, a legal settlement was declared to be gained by *birth;* or by *inhabitancy, apprenticeship,* or *service* for forty days; within which period all intruders were made removable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10*l.* The frauds naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. II. c. 17, which directed *notice* in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given; and those circumstances were from time to time altered, enlarged, or restrained, whenever the experience of new inconveniences, arising daily from new regulations, suggested the necessity of a remedy. And the doctrine of *certificates* was invented, by way of counterpoise, to restrain a man and his family from acquiring a new settlement by any length of residence whatever, unless in two particular excepted cases; which made parishes very cautious of giving such certificates, and of course confined the poor at home, where frequently no adequate employment could be had.

Gilbert's Act.

'By the statute 22 Geo. III. c. 83 [h] (commonly known as *Gilbert's Act*) parishes were enabled to provide poorhouses for the reception of paupers, over whom a governor was to be appointed by the justices, and regulations were made for their being duly visited. A guardian was to be appointed for each parish adopting the Act, and power was given to visitors and guardians to contract with persons to provide the poor in the poorhouses with diet and clothing, commonly termed, *farming the poor.* The statute also provided for children being put out to service, or bound out as parish apprentices, by the guardians, with the approbation of the visitor; and the guardians were required to find employment for poor persons able and willing

[h] Explained and amended by 35 Geo. III. c. 35; 41 Geo. III. c. 9; 42 Geo. III. c. 74; 43 Geo. III. c. 110; 50 Geo. III. c. 50; 1 & 2 Geo. IV. c. 56.

to work, but who could not get employment; while idle persons might be sent to the house of correction. The adoption of this Act, however, was not compulsory on parishes, and, consequently, it has never been in universal operation.'

'By the statute 35 Geo. III. c. 101,[i] repealing so much of the statute 13 & 14 Car. II. c. 12, as enabled justices to remove persons likely to become chargeable, no person (except felons, rogues, and vagabonds)[j] was to be removable until he became actually chargeable; and power was given to suspend the removal of sick persons. The same statute declared that no person should thereafter gain a settlement by delivery and publication of a written notice, nor by paying taxes for a tenement of less than 10*l.* yearly value. The statute 59 Geo. III. c. 12 (commonly called *Sturges Bourne's Act*) empowered parishes to establish select vestries for the concerns of the poor; to build or enlarge workhouses where none, or an insufficient one existed before. Parishes were also enabled to provide land for the employment of the poor, not exceeding twenty acres.[k] Owners, instead of the occupiers of certain houses, were made rateable. Power was given to remove chargeable poor born in Scotland, Ireland, and in the Isle of Man, Jersey, and Guernsey, although they have not committed any act of vagrancy. Another statute of the same session, 59 Geo. III. c. 50, enacted that no settlement should be acquired by renting any tenement except a house or land in the parish, of the annual value of 10*l.*, hired and rented for a year; but this Act was soon afterwards repealed by the statute 6 Geo. IV. c. 57, which, as amended by the statute 1 Will. IV. c. 18, re-enacts, with various restrictions to prevent the numerous frauds on parishes which had been effected in the meantime, the provision of the statute of George the Third, as to this mode of settlement.' Sturges Bourne's Act.

'Under this complicated system of poor laws, the amount annually expended in the relief of the poor became such a serious burden on the rest of the community, that it was found necessary to revise the whole machinery, and even the principles of the previous legislation.'

'This was effected in 1834 by the statute 4 & 5 Will. IV.

[i] Amended by 49 Geo. III. c. 124.

[j] As to the removability of rogues and vagabonds, see 5 Geo. IV. c. 83.

[k] Extended to fifty acres by 1 & 2 Will. IV. c. 42. See also 1 & 2 Will. IV. c. 59; and 2 Will. IV. c. 42.

The Poor Law Commissioners.

c. 76. A board of three commissioners, styled "The Poor Law Commissioners for England and Wales," was established for a period of five years; and the administration of relief to the poor throughout the kingdom, according to the existing laws, was made subject to their direction and control. They were empowered to make and issue general rules, orders, and regulations (subject to disallowance by the king in council) for the management of the poor, the government of workhouses, the maintenance, education, and apprenticing of the children of poor persons, and the guidance and control of all guardians, vestries, and parish officers, so far as related to the management or relief of the poor; and also for the keeping, examining, auditing, and allowing of accounts, and the making and entering into contracts in all matters relating to such management or relief, or to any expenditure for the relief of the poor.

Unions.

The commissioners were also empowered to unite several adjacent parishes into one union, for the administration of the poor laws; each parish being, however, separately chargeable with the expense of its own poor, the share of expenses incurred for the common benefit of all the parishes being ascertained by means of triennial averages. On the formation of such a union, the government of the workhouses and the

Guardians of the Poor.

administration of relief was vested in a board of guardians, elected by the ratepayers, with some other *ex officio* guardians, the commissioners being empowered to make rules, orders, and regulations to be observed in any then existing, or any future workhouse, and to prescribe the nature and amount of the relief to be given to, and the labour to be exacted from, the persons relieved, and the preservation therein of good order. These bye-laws the justices are to see enforced, pursuant to statute 30 Geo. III. c. 49. Besides assistant-commissioners, whose appointment is authorised by the statute, local paid officers are appointed for superintending or assisting in the administration of the relief and employment of the poor, and auditing the accounts; masters of workhouses and paid parish officers being under the control of the board of guardians. The duties of overseers, although still onerous with regard to the collection and distribution of money, and the keeping of the accounts, were, on the other hand, relieved by the transfer of some of their former duties

Relieving Officers.

to the relieving-officers of the union, and they were de-

prived of their former power of giving relief or allowances to paupers.'

'With respect to the mode of relieving poor persons, great alterations were effected by restraining out-door relief. The practice which had obtained, and was productive of much evil, of giving out-door relief to persons who were wholly or partially employed, was remedied by making the entire administration of out-door relief subject to such rules, orders, and regulations, as the commissioners should fix for the guidance of the guardians; except under special circumstances and in cases of emergency, which were to be forthwith reported to the commissioners. Any two justices, however, were empowered to order out-door relief to aged and infirm persons wholly unable to work, or in other cases of necessity.' Out-door Relief.

'Under this statute, it may be added, relief to the wife is deemed relief to the husband, and relief to the child relief to the parent; and husbands are made liable to maintain children of their wives born before marriage. All relief given to a man or his family may be considered as a loan; to recover which, the justices are empowered to attach the wages of a husband or father in the hands of masters or employers. The justices are further required to enforce compliance with the rules of the commissioners relating to the apprenticeship of poor children; and the ratepayers are authorised to raise money on security of the rates, for the purposes of emigration.'

'With respect to the settlement of the poor, it was enacted, that no settlement should be thereafter acquired, by hiring and service, or by residence under the same, or by serving an office, or by apprenticeship in the sea service; and that no settlement should be acquired or completed by occupying a tenement, unless the occupier should have been assessed to and paid the poor-rate; and that no settlement gained by virtue of any possession of any estate or interest in any parish should be retained for any longer time than the person acquiring it should inhabit within ten miles thereof. It was also enacted, that thenceforth persons should not be removed until after twenty-one days' notice of chargeability, and the course of proceeding on appeals against orders of removals was reformed.' Settlement, how acquired.

'Subsequent statutes provided for the more equitable assessment of property and the collection of the poor-rates;[1] for the

[1] 6 & 7 Will. IV. c. 96; 2 & 3 Vict. c. 84.

purchase of property, and the advance of loans in relation to workhouses and other matters[m] connected with the poor; for compelling putative fathers to maintain their illegitimate children on the application of the mother to justices in petty sessions, subject to the right of appeal;[n] and for the abolition of compulsory apprenticeships, and the regulation of the respective duties of poor apprentices and their masters.[o] Other statutes prescribed the qualifications of guardians, and the mode of voting of the ratepayers in parochial elections;[p] the costs of relief to, and the management and care of, pauper lunatics;[q] the mode of election, and the duties when elected, of auditors;[r] and the method in which schools were to be provided and regulated.[s] The removal of persons born out of but becoming chargeable in England, was provided for by other enactments,[t] which make persons immovable from any parish or place where they have resided for five years[u] (provisions of very great importance, both as regards the poor themselves, their employers, and the interest of the community at large), and also prevent the cruel hardship of the immediate removal of poor widows on the death of their husbands.'[v]

'In the mean time the Poor Law Board, as constituted under the statute 4 & 5 Will. IV. c. 76, was continued from time to time down to the year 1847.[w] It being then found advisable to reconstruct the board exercising the supreme control, this was effected by the statute 10 & 11 Vict. c. 109, which gave power to Her Majesty to appoint commissioners, to be styled "Commissioners for Administering the Laws for Relief of the Poor in England;" the Lord President of the Council, the Lord Privy Seal, the Principal Secretary of State for the Home Department, and the Chancellor of the Exchequer, being commissioners *ex officio*, but the commissioner

[m] 5 & 6 Will. IV. c. 69; 6 & 7 Will. IV. c. 107; 7 Will. IV. and 1 Vict. c. 50; 1 & 2 Vict. c. 25; 5 & 6 Vict. c. 18.

[n] 7 & 8 Vict. c. 101; 8 & 9 Vict. c. 10.

[o] 7 & 8 Vict. c. 101.

[p] 7 & 8 Vict. c. 101; 11 & 12 Vict. c. 82.

[q] 7 & 8 Vict. c. 101; 8 & 9 Vict. c. 126; 9 & 10 Vict. c. 84; 10 & 11 Vict. c. 43.

[r] 7 & 8 Vict. c. 101.

[s] 6 & 7 Will. IV. c. 70; 7 & 8 Vict. c. 101; 11 & 12 Vict. c. 82. See also 18 & 19 Vict. c. 39.

[t] 8 & 9 Vict. c. 117; 8 & 9 Vict. c. 83; 10 & 11 Vict. c. 33.

[u] 9 & 10 Vict. c. 66; 11 & 12 Vict. c. 111; 12 & 13 Vict. c. 103, s. 4.

[v] 9 & 10 Vict. c. 66.

[w] 3 & 4 Vict. c. 42; 5 Vict. c. 10; 5 & 6 Vict. c. 57.

first appointed by the Crown being styled "the President;" and to these new commissioners all the powers and duties of the former commissioners were transferred. Power was given to the commissioners to appoint inspectors, and other provisions were made for insuring the due visitation of workhouses.'

The Poor Law Board.

'This statute, although, like its predecessor, only passed for five years, has been subsequently continued,[x] and is now in full force, the commissioners acting under the designation of *The Poor Law Board.*'[y]

'Several Acts have been subsequently passed, however, on various branches of the Poor Laws. The procedure in respect of orders of removal, and appeals from such orders, has been remodelled, and the necessary forms placed out of the reach of many technical and vexatious objections which formerly disgraced this branch of the law;[z] the payment of parish debts, and the audit of their accounts, have been provided for,[a] as well as the mode of regulating and apportioning between parishes and unions the charges for relief.[b] The maintenance of the poor in houses other than workhouses has been regulated and controlled;[c] the law as to the burial of poor persons amended;[d] and various regulations made with respect to the education of the poor, including power to guardians to grant relief to enable certain poor persons to provide education for their children.[e] These and a host of other provisions, although of undoubted benefit to society, have left the law relating to the relief of the poor in such a state of complexity, as to render their speedy consolidation a work rather of necessity than of mere convenience.'

Law of settlements.

The 'existing' law of settlements may be, 'however,' reduced to the following general heads; or, a settlement in a parish may be acquired, 1. By *birth;* for, wherever a child is first known to be, that is always *primâ facie* the place of settlement, until some other can be shown.[f] This was also generally the place of settlement of a bastard child; for a bastard, having

[x] 15 & 16 Vict. c. 59; 17 & 18 Vict. c. 41.

[y] 12 & 13 Vict. c. 103, s. 21.

[z] 11 & 12 Vict. c. 31; and see the 12 & 13 Vict. c. 45.

[a] 11 & 12 Vict. c. 97.

[b] 11 & 12 Vict. c. 110; 12 & 13 Vict. c. 103; 13 & 14 Vict. c. 101; 14 & 15 Vict. c. 105.

[c] 12 & 13 Vict. c. 13.

[d] 18 & 19 Vict. c. 79.

[e] 18 & 19 Vict. c. 34.

[f] Carth. 433; Comb. 364; Salk. 485; 1 Lord Raym. 567.

[363] in the eye of the law no father, could not be referred to *his* settlement, as other children might;[g] 'but now every illegitimate child, born after the 14th August 1834, follows the settlement of the mother; until it attains the age of sixteen, or it acquires a settlement in its own right.'[h] Although the place of birth be *primâ facie* the settlement 'of legitimate children,' yet it is not conclusively so; for there are, 2. Settlements by *parentage*, being the settlement of one's father or mother: all legitimate children being really settled in the parish where their parents are settled, until they get a new settlement for themselves.[i] A new settlement may be acquired several ways; as, 3. By *marriage*. For a woman, marrying a man that is settled in another parish, changes her own settlement; the law not permitting the separation of husband and wife.[j] But if the man has no settlement, hers is suspended during his life, if he remains in England, and is able to maintain her; but in his absence or after his death, she may be removed to her old settlement.[k] 'So also during his inability she may be removed with his consent, but not without.[l] These two species of settlements, namely, by birth and by marriage, are termed *derivative* settlements.' The other methods of acquiring settlements in any parish are all reducible, 'under the statute 13 & 14 Car. II. c. 12, s. 1,' to this one, of *forty days' residence* therein, 'while irremovable. These methods of acquiring a settlement are now coupled with a number of requirements imposed by subsequent statutes.' 4. *Renting* for a year a tenement of the yearly value of ten pounds, and residing forty days in the parish, gained a settlement 'by force of the statute of Charles II. upon the principle of having
[364] substance enough to gain credit for such a house. Now, however, the tenement must consist of a separate and distinct building, or of land actually occupied, and rent actually paid for the year; and in addition, the occupier must be assessed to and pay the poor-rate in respect of the tenement.'[m] 5. Being charged to and paying the public *taxes* and levies of the parish (excepting those for scavengers, highways,[n] and the duties on houses and

g Salk. 427.

h 4 & 5 Will. IV. c. 76, s. 71.

i Salk. 528; 2 Lord Raym. 1473.

j Stra. 544.

k Foley, 219, 251, 252; Burr. Sett. C. 370.

l *R.* v. *Eltham*, 5 East, 113; *R.* v. *Carleton*, Burr. S. C. 813.

m 59 Geo. III. c. 50; 6 Geo. IV. c. 57; 1 & 2 Will. IV. c. 18; 4 & 5 Will. IV. c. 76, s. 66.

n Stat. 9 Geo. I. c. 7, § 6.

windows;[o] 'coupled with forty days' residence, gained a settlement under the statute 3 W. & M. c. 11, s. 6; but now such a settlement must be accompanied by all the requirements necessary to gain a settlement by renting a tenement, except that the occupation of such tenement, to gain a settlement by payment of taxes, need not be for a whole year, a partial occupation being sufficient.'[p] 6. Being bound an *apprentice*, gives the servant and apprentice a settlement without notice,[q] in that place wherein he serves the last forty days. This is meant to encourage application to trades, and going out to reputable service. 'No settlement, however, can now be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise.'[r] Lastly, the having an *estate* of one's own, and residing thereon forty days, however small the value may be, in case it be acquired by act of law or of a third person, as by descent, gift, devise, &c., is a sufficient settlement;[s] but if a man acquire it by his own act, as by purchase (in its popular sense, in consideration of money paid), then unless the consideration advanced *bonâ fide* be 30*l.* it is no settlement for any longer time than the person shall inhabit thereon.[t] He is in no case removable from his own property; but he shall not, by any trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement. 'There is this peculiarity about settlements by estate, that no person retains any settlement, gained by virtue of any possession of any estate or interest in any parish, for any longer or further time than he inhabits within ten miles thereof; in case he ceases to inhabit within such distance, and thereafter becomes chargeable, he is liable to be removed to the parish wherein previously to such inhabitancy he was legally settled, or in case he has subsequently to such inhabitancy gained a legal settlement in some other parish, then he is removable to such other parish.'

'Such are the several modes in which a settlement can now be acquired. Settlements acquired, however, under statutes subsequently repealed or altered, remain in force for the pur-

[o] Stat. 21 Geo. II. c. 10; 18 Geo. III. c. 26.

[p] See the statutes 35 Geo. III. c. 101, s. 4, and 6 Geo. IV. c. 57, s. 2; and *R.* v. *Stoke Damarel*, 6 A. & E. 308.

[q] Stat. 3 & 4 Will. & M. c. 11; 8 & 9 Will. III. c. 10; 31 Geo. II. c. 11.

[r] Stat. 4 & 5 Will. IV. c. 76, s. 67.

[s] Salk. 524.

[t] Stat. 9 Geo. I. c. 7.

pose of determining the places to which parties are removable who have not acquired any subsequent settlement.'

Removal of the poor.

All persons not so settled, 'on becoming chargeable,' may be removed to their own parishes on complaint of the overseers, by two justices of the peace, 'on the expiration of twenty-one days after notice of chargeability, and a copy of the order of removal, and a statement of the grounds of removal, have been sent to the overseers of the opposite parish (if within such period a copy of the depositions shall be applied for, in which case the pauper is not removable until after a further period of fourteen days), unless the opposite parish appeals to the sessions, in which case the pauper cannot be removed until after the determination of the appeal.' [u]

This right of removal is further subject to the important recent provision already noticed, namely, that no person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant; [v] and whenever any person has a wife or children having no other settlement than his or her own, such wife and children are removable whenever he or she is removable, and are not removable when he or she is not removable.[w] So no woman residing in any parish with her husband at the time of his death, is removable for twelve calendar months next after his death, if she so long continues a widow.' [x].

These are the general heads of the laws relating to the poor, which by the resolutions of the courts of justice thereon within a century past, are branched into a great variety, 'a subject of which it is impossible in these elementary Commentaries to
[365] treat at greater length, although it is unquestionably one of the most important and extensive branches of our statute law.'

[u] Stat. 4 & 5 Will. IV. c. 76, s. 79; 11 & 12 Vict. c. 31.

[v] See the stat. 9 & 10 Vict. c. 66, s. 1, and the proviso as to the deduction of certain periods from the computation of the five years.

[w] 9 & 10 Vict. c. 66, s. 1.

[x] 9 & 10 Vict. c. 66, s. 2.

CHAPTER X.

OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

HAVING in the eight preceding chapters, treated of persons as [366] they stand in the public relations of *magistrates*, I now proceed to consider such persons as fall under the denomination of the *people*. And herein all the inferior and subordinate magistrates, treated of in the last chapter, are included.

Natural-born subjects.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the Crown of England; that is, within the legiance, or, as it is generally called, the allegiance of the king: and aliens, such as are born out of it. Allegiance is the tie or *ligamen*, which binds the subject to the sovereign, in return for that protection which the sovereign affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called his *fidelitas* or fealty; and an oath of fealty was required, by the feudal law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our ancient oath of allegiance;[a] [367] except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by

Their allegiance.

[a] 2 Feud. 5, 6, 7.

name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception; "*contra omnes homines fidelitatem fecit.*"[b] Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *homines ligii*, or liege men; and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other for lands held under their respective sovereignties, a distinction was always made between *simple* homage, which was only an acknowledgment of tenure;[c] and *liege* homage, which included the fealty before mentioned, and the services consequent upon it. Thus when our Edward III., in 1329, did homage to Philip VI. of France, for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage.[d] But with us, in England, it becoming a settled principle of tenure, that *all* lands in the kingdom are holden of the king as the sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy, the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial.

The oath of allegiance.

And the oath of allegiance, as administered for upwards of six hundred years,[e] contained a promise "to be true and faithful "to the king and his heirs, and truth and faith to bear of life "and limb and terrene honour, and not to know or hear of [368] "any ill or damage intended him, without defending him there-"from." Upon which Sir Matthew Hale[f] makes this remark: that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But, at the Revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, the present

[b] 2 Feud. 99.
[c] 7 Rep. *Calvin's* case, 7.
[d] Mod. Un. Hist. xxiii. 420.
[e] Mirror, c. 3, § 35; Fleta, 3, 16; Britton, c. 29; 7 Rep. *Calvin's* case, 6.
[f] 1 Hal. P. C. 63.

form was introduced by the Convention Parliament; which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear *true* allegiance to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists.[g] The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority;[h] and the oath of abjuration, introduced in the reign of King William,[i] very amply supplied the loose and general texture of the oath of allegiance; 'and although consistently curtailed by subsequent statutes,[j] it still recognizes the right of the sovereign,' engaging to support him to the utmost of the juror's power, 'against the descendants of the Pretender, and against all other enemies.' This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection.[k] And the oath of allegiance may be tendered[l] to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county. 'The more tolerant spirit of recent legislation has, however, provided particular forms of the oaths of allegiance, supremacy, and abjuration for Roman Catholics, so as to admit of their taking them,[m] and has also greatly relieved her Majesty's subjects generally from the penalties and disabilities consequent on the neglect or refusal to take these oaths.[n] Peers and Members of Parliament are, however, still liable to a heavy pecuniary penalty if they vote in Parliament, without taking the oath of abjuration.'[o]

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the Crown, is fully invested with all the rights, and bound to all the duties of sovereignty, before his coronation; so the

[g] Stat. 1 W. & M. st. 1, c. 8.
[h] Stat. 1 W. & M. st. 1, c. 8.
[i] Stat. 13 Will. III. c. 6.
[j] 1 Ann. st. 1, c. 22; 6 Ann. c. 7; 1 Geo. I. st. 2, c. 13; 6 Geo. III. c. 53.
[k] 1 Geo. I. c. 13; 6 Geo. III. c. 53.
[l] 2 Inst. 121; 1 Hal. P. C. 64.
[m] 10 Geo. IV. c. 7. See also 6 & 7 Vict. c. 28.
[n] 7 & 8 Vict. c. 102; 9 & 10 Vict. c. 59.
[o] 15 & 16 Vict. c. 43.

[369] subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance.[p] The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions Sir Edward Coke very justly to observe,[q] that "all subjects are equally bounden "to their allegiance, as if they had taken the oath; because "it is written by the finger of the law in their hearts, and the "taking of the corporal oath is but an outward declaration of "the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion.*

Natural allegiance.

Allegiance, both expressed and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the sovereign's dominions immediately upon their birth.[r] For, immediately upon their birth, they are under the protection of the Crown: at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature.[s] An Englishman who removes to France, or to China, owes the same allegiance to the King of England there as at home, and twenty years hence as well as now. For it is a principle of universal law,[t] that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other; and
[370] cannot be divested without the concurrent act of that prince to whom it was first due. Indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled

p 1 Hal. P. C. 61.
q 2 Inst. 121.
r 7 Rep. 7.
s 2 P. Wms. 124.
t 1 Hal. P. C. 68. Case of *Eneas M'Donald*, Foster, C. L. 184.

by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince.

Local allegiance. Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection;[u] and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local temporary only: and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. From which considerations Sir Matthew Hale[v] deduces this consequence, that, though there be an usurper of the Crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise anything against his crown and dignity: wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defence or aid of the rightful king) have been afterwards punished with death; because of the breach of that temporary allegiance which was due to him as king *de facto*. And upon this footing, after Edward IV. recovered the crown, which had been long detained from his [371] house by the line of Lancaster, treasons committed against Henry VI. were capitally punished, though Henry had been declared an usurper by Parliament.

To whom allegiance is due. This oath of allegiance, or rather the allegiance itself, is held to be applicable not only to the political capacity of the sove-

[u] 7 Rep. 6.

[v] 1 Hal. P. C. 60.

reign, or regal office, but to his natural person and blood-royal: and for the misapplication of their allegiance, viz., to the regal capacity or Crown, exclusive of the person of the king, were the Spensers banished in the reign of Edward II.[w] And from hence arose that principle of personal attachment and affectionate loyalty which induced our forefathers (and if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life, fortune, and family, in defence and support of their liege lord and sovereign.

This allegiance then, both express and implied, is the duty of all the king's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehaviour: the explanation of which rights is the principal subject of the two first books of these Commentaries. The same is also in some degree the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall, however, here endeavour to chalk out some of the principal lines whereby they are distinguished from natives, descending to farther particulars when they come in course.

Disabilities and rights of aliens.

An alien born may purchase lands or other estates; but not (except by the provisions of the statute about to be noticed) for his own use: for the crown is thereupon entitled to them.[x] If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the King of England; which would probably be inconsistent with that which he owes to his own natural liege lord: [372] besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore by the civil law such contracts were also made void:[y] but the prince had no such advantage of forfeiture thereby as with us in England. Among other reasons which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to

[w] 1 Hal. P. C. 67. [x] Co. Litt. 2. [y] Cod. l. 11, tit. 55.

acquire any landed property: for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange. Yet an alien may, at common law, acquire a property in goods, money, and other personal estate, or may hire a house for his habitation:[z] for personal estate is of a transitory and moveable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade. 'And now, by the statute 7 & 8 Vict. c. 66, s. 4, every alien, being the subject of a friendly state, is empowered to take and hold every species of personal property, except chattels real, as fully and effectually as if he were a natural-born subject. And every alien residing in this kingdom may (by any mode of acquisition) take and hold any lands, houses, or other tenements for the purpose of residence, or of occupation by himself, or his servants, for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one, as fully and effectually, except the right to vote at elections for Members of Parliament, as if he were a natural-born subject.' Aliens also may trade as freely as other people;[a] and an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate.[b] When I mention these common law rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights, no privileges, unless by the special favour 'of the Crown, or express legislative enactment,' during the time of war.

When I say that an alien is one who is born out of the sovereign's dominions, or allegiance, this also must be understood with some restrictions. The common-law indeed stood absolutely so, with only a very few exceptions; so that a particular Act of Parliament became necessary after the Restoration,[c] "for the naturalization of children of his majesty's English

[z] 7 Rep 17.

[a] 'Aliens were formerly subject to certain higher duties at the custom-house, as to which see *post*, p. 308. There were also some statutes of Henry VIII., prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by the statute 5 Eliz. c. 7.

[b] Lutw. 34. Formerly in France the king, at the death of an alien, was entitled to all he was worth by the *droit d'aubaine* or *jus albinatus*, unless he had a peculiar exemption.

[c] Stat. 29 Car. II. c. 6.

"subjects, born in foreign countries during the late troubles." [373] And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of ambassadors born abroad were always held to be natural subjects;[d] for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the King of England's allegiance, represented by his father, the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England; and accordingly it has been so adjudged in behalf of merchants.[e] But by several more modern statutes[f] these restrictions were still further taken off; so that all children, born out of the king's ligeance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. 'And now, by the before-mentioned statute 7 & 8 Vict. c. 66, persons born abroad of a mother, being a natural-born subject of the United Kingdom, are rendered capable of taking any real or personal estate by devise, purchase, or succession.'

The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such. In which the constitution of France differs from ours; for there, by their *jus albinatus*, if a child be born of foreign parents, it is an alien.[g]

Denizens.

A denizen is an alien born, but who has obtained *ex donatione legis* letters-patent to make him an English subject: a

[d] 7 Rep. 18.

[e] Cro. Car. 601; Mar. 91; Jenk. Cent. 3.

[f] 7 Ann. c. 5; 4 Geo. II. c. 21, and 13 Geo. III. c. 21.

[g] Jenk. Cent. 3, cites *treasure françois*, 312; 'but the child may, within one year after attaining twenty-one, elect France for his country.' Code Civil, 1, i. tit. 1, s. 9.

high and incommunicable branch of the royal prerogative.[h] [374] A denizen is in a kind of a middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien 'may not do except under the statute before mentioned;' but he cannot take by inheritance:[i] for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after* may.[j] And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c., from the Crown.[k]

Naturalized persons.

'Until recently,' naturalization could be performed but by Act of Parliament: by which an alien was put in exactly the same state as if he had been born in the king's ligeance; except only that he was incapable, as well as a denizen, of being a member of the privy council or parliament, and of holding offices, grants, &c.;[l] 'nor could any' bill for naturalization be received in either house of parliament without such disabling clause in it:[m] nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country; unless he should have resided in Britain for seven years next after the commencement of the session in which he was naturalized.[n] Neither could any person be naturalized or restored in blood, unless he had received the Sacrament of the Lord's Supper within one month before the bringing in of the bill; and unless he also took the oaths of allegiance and supremacy in the presence of the parliament,[o] provisions which were usually dispensed with by special Acts of Parliament, previous to bills of naturalization of any foreign princes or princesses.[p]

These are the principal distinctions between aliens, denizens, and natives: distinctions which it has been frequently endeavoured since the commencement of the last century to

[h] 7 Rep. *Calvin's* case, 25.
[i] Co. Litt. 8 a.
[j] Co. Litt. 8; Vaugh. 285.
[k] Stat. 12 Will. III. c. 2.
[l] Stat. 12 Will. III. c. 2.
[m] Stat. 1 Geo. I. st. 2, c. 4.
[n] Stat. 14 Geo. III. c. 84.
[o] Stat. 7 Jac. I. c. 2.
[p] Stat. 4 Ann. c. 1; 7 Geo. II. c. 3; 9 Geo. II. c. 24; 4 Geo. III. c. 4. See also the statutes 56 Geo. III. cc. 12, 13; and 3 & 4 Vict. cc. 1 & 2.

[375] lay almost totally aside, by one general Naturalization Act for all foreign Protestants. An attempt which was once carried into execution by the statute 7 Ann. c. 5; but this, after three years' experience of it, was repealed by the statute 10 Ann. c. 5, except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad. 'The legislature has recently, however, rendered many of these distinctions obsolete, by repealing the statutes requiring a special Act for naturalization, and giving a more simple mode of attaining the same object. By the before-mentioned statute, the 7 & 8 Vict. c. 66, aliens resident in this country, on presenting a memorial to her Majesty's secretary of state for the Home Department, and proving the truth of the allegations of the memorial, and taking an oath of allegiance and fidelity, may, if the secretary of state think fit to grant it, obtain a certificate granting to the memorialist all the rights and capacities of a natural-born British subject, except the capacity of being a member of the privy council or a member of either house of parliament, and any other rights and capacities (if any) especially excepted by such certificate.' 'By former and still existing statutes,' every foreign seaman, who in time of war serves two years on board an English ship by virtue of the king's proclamation, is *ipso facto* naturalized, under the like restrictions as in statute 12 Will. III. c. 2;[q] and all foreign Protestants and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign Protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by statute 4 Geo. II. c. 21, shall be (upon taking the oaths of allegiance and abjuration, or, in some cases, an affirmation to the same effect) naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in parliament, or in the privy council, and holding offices or grants of lands, &c., from the Crown, within the kingdoms of Great Britain or Ireland.[r] They therefore are

[q] Stat. 13 Geo. II. c. 3.

[r] Stat. 13 Geo. II. c. 7; 20 Geo. II. c. 44; 22 Geo. II. c. 45; 2 Geo. III. c. 25; 13 Geo. III. c. 25.

admissible to all other privileges which Protestants or Jews born in this kingdom are entitled to. What those privileges are, with respect to Jews[s] in particular, was the subject of very high debates about the time of the famous Jew Bill;[t] which enabled all Jews to prefer bills of naturalization in parliament, without receiving the sacrament, as ordained by statute 7 Jac. I. The Act lived only a few months, and was then repealed;[u] 'and although a declaration is now substituted in all cases where the sacrament was required to be taken,[v] and a special form of declaration has been subsequently provided for Jews elected to municipal offices,[w] they are still prevented from sitting in parliament, or holding high offices, by reason of the form of the oath requiring that it shall be made on the true faith of a *Christian*.[x]

[s] A pretty accurate account of the Jews till their banishment in 8 Edw. I. may be found in Prynne's *Demurrer*, and in Molloy, *De Jure Maritimo*, b. 3, c. 6.

[t] Stat. 26 Geo. II. c. 26.

[u] Stat. 27 Geo. II. c. 1.

[v] 9 Geo. IV. c. 17.

[w] 8 & 9 Vict. c. 52.

[x] 6 Geo. III. c. 53; 9 Geo. IV. c. 17; *Salomons* v. *Miller*, 8 Ex. 778.

CHAPTER XI.

OF THE CLERGY.

THE people, whether aliens, denizens, or natural-born subjects, are divisible into two kinds; the clergy and the laity: the clergy, comprehending all persons in holy orders and in ecclesiastical offices, will be the subject of the following chapter.

This venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the services of Almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the Reformation on account of the ill-use which the popish clergy had endeavoured to make of them. For, the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by Sir Edward Coke,[a] that, as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them. The personal exemptions do indeed for the most part continue. A clergyman cannot be compelled to serve on a jury,[b] nor to appear at a court-leet or view of frank-pledge;[c] which almost every other person is obliged to do;[d] but if a layman is summoned on a jury, and before the trial takes orders, he shall
[377] notwithstanding appear and be sworn.[e] Neither can he be chosen to any temporal office; as bailiff, reeve, constable, or the like, in regard of his own continual attendance on the sacred function.[f] During his attendance on Divine service he is privileged from arrest in civil suits,[g] 'and the infraction of

[a] 2 Inst. 4.

[b] 6 Geo. IV. c. 50, s. 1.

[c] 52 Hen. III. c. 10.

[d] F. N. B. 160; 2 Inst. 4.

[e] 4 Leon. 190.

[f] Finch, L. 88.

[g] Stat. 50 Edw. III. c. 5; 1 Ric. II. c. 15.

this privilege is an indictable misdemeanor.'[h] In cases also of felony, a clerk in orders formerly had the benefit of his clergy, without being branded in the hand; and might likewise have it more than once: in both of which particulars he was distinguished from a layman,[i] 'as long as the benefit of clergy existed.'[j] But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen are incapable of sitting in the House of Commons, 'or of being councillors or aldermen in boroughs.'[k] By statute 21 Hen. VIII. c. 13, they were not (in general) allowed to take any lands or tenements to farm, upon pain of 10*l.* *per* month, and total avoidance of the lease; nor upon like pain to keep any tanhouse or brewhouse; nor to engage in any manner of trade, nor sell any merchandise, under forfeiture of the treble value. Which prohibition was consonant to the canon law. 'And although that statute has been repealed,[l] yet new provisions prohibit trading by spiritual persons, with certain exceptions. Thus no spiritual person is permitted to farm more than eighty acres, without the consent of the ordinary; nor to be a partner in any trade or dealing for profit, unless it be carried on by the other partners. In such cases of partnership no spiritual person can be a director or managing partner, but he may carry on the business of a schoolmaster, or be a director or partner in any benefit or insurance society. He may buy or sell to the extent incidental to his occupation of land, but cannot do so in person or at a public market.'[m]

In the frame and constitution of ecclesiastical polity there are divers ranks and degrees; which I shall consider in their respective order, merely as they are taken notice of by the secular laws of England, without intermeddling with the canons and constitutions by which the clergy have bound themselves. And under each division I shall consider, 1. The method of their appointment; 2. Their rights and duties; and, 3. The manner wherein their character or office may cease.[n]

[h] 9 Geo. IV. c 31, s. 23.

[i] 2 Inst. 637; stat. 4 Hen. VII. c. 13, and 1 Edw. VI. c. 12.

[j] As to benefit of clergy, see *post*, vol. iv. ch. 28.

[k] 5 & 6 Will. IV. c. 76, s. 28.

[l] 57 Geo. III. c. 99.

[m] 1 & 2 Vict. c. 10, & c. 106, and 4 & 5 Vict. c. 14.

[n] The powers of the Ecclesiastical Commissioners have been already noticed, *ante*, p 276.

I. Archbishops and bishops.

Their appointment.

[378]

I. An archbishop or bishop is elected by the chapter of his cathedral church, by virtue of a license from the Crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy:[o] till at length it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands, by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A.D. 773, by Pope Hadrian I., and the council of Lateran,[p] and universally exercised by other Christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England[q] (as well as other kingdoms in Europe), even in the Saxon times: because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation.[r] But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier: pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction:

[o] *Per clerum et populum.* Palm. 25; 2 Roll. Rep. 102; Matt. Par. A.D. 1095.

[p] Decret. 1, dist. 63, c. 22.

[q] Palm. 28.

[r] "*Nulla electio prælatorum* (sunt verba Ingulphi) *erat mere libera et canonica; sed omnes dignitates, tam episcoporum quam abbatum, per annulum et baculum regis curia pro suâ complacentiâ conferebat.*" *Penes clericos et monachos fuit electio, sed electum a rege postulabant.* (Selden, Jan. Aug. l. 1, § 39.)

and pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them.[s] This was a bold step towards effecting the plan then adopted by the Roman see, of [379]
rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* and not *per annulum et baculum;* and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while its other pretensions.[t]

This concession was obtained from King Henry the First in England, by means of that obstinate and arrogant prelate, archbishop Anselm;[u] but King John (about a century afterwards), in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up, by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops: reserving only to the Crown the custody of the temporalities during the vacancy; the form of granting a licence to elect (which is the original of our *congé d'elire*), on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause.[v] This grant was expressly recognized and confirmed in King John's *Magna Charta,* and was again established by statute 25 Edw. III. st. 6, s. 3.

But by statute 25 Hen. VIII. c. 20,[w] the ancient right of nomination was, in effect, restored to the Crown: it being enacted that, at every future avoidance of a bishopric, the king may send the dean and chapter his usual licence to pro-

[s] Decret. 2, caus. 16, qu. 7, c. 12, 13.

[t] Mod. Un. Hist. xxv. 363; xxix. 115.

[u] M. Paris, A.D. 1107.

[v] M. Paris, A.D. 1214; 1 Rym. Fœd. 198.

[w] 'Repealed by 1 Edw. VI. c. 2, but revived by 1 & 2 P. & M. c. 8, and 1 Eliz. c. 1. See as to *donative* bishoprics, 12 Rep. 7, and Harg. Co. Lit. 134 a. n. 5.'

ceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and, if the dean and chapter delay their election above twelve days, the nomina-
[380] tion shall devolve to the king, who may by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the archbishop of the province: if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: which they are bound to perform immediately, without any application to the see of Rome. After which the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this Act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*.[x]

Powers and duties of archbishops.

An archbishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause.[y] The archbishop has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As archbishop he, upon receipt of the sovereign's writ, calls the bishops and clergy of his province to meet in convocation; but without this writ he cannot assemble them.[z] To him all appeals are made from inferior jurisdictions within his province; and as an appeal lies from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court.[a] During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the Crown is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office

[x] *The Queen* v. *The Archbishop of Canterbury*, 11 Q. B. 483. The case of *Dr. Hampden*, by Richard Jebb, Esq.: London, 1849.

[y] Lord Raym. 541.

[z] 4 Inst. 322, 323.

[a] See also the provisions of the Church Discipline Act, *post*, p. 384.

of prior of Canterbury was abolished at the Reformation.[b] The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop; in lieu of which it is usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see as the archbishop himself shall choose; which is therefore called his *option*:[c] which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury.[d] And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ preces;* whereby the emperor exercised a right of naming to the first prebend that became vacant after his accession in every church of the empire.[e] A right that was also exercised by the crown of England in the reign of Edward I.;[f] and which probably gave rise to the royal corodies which were mentioned in a former chapter. It is likewise the privilege, by custom, of the archbishop of Canterbury, to crown the kings and queens of this kingdom. And he has also by the statute 25 Hen. VIII. c. 21, the power of granting dispensations in any case, not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time,[g] to hold two livings,[h] and the like: and on this also is founded the right he exercises of conferring degrees, in prejudice of the two universities.[i] [381]

[b] 2 Roll. Abr. 223.

[c] Cowel's interpr. tit. *Option.*

[d] Sherlock of Options, 1.

[e] Dufresne, V. 806; Mod. Un. Hist. xxix. 5.

[f] *Rex, &c. salutem, Scribatis episcopo Karl. quod—Roberto de Ieard pensionem suam, quam ad preces regis prædicto Roberto concessit, de cætero solvat; et de proximo ecclesia vacatura de collatione prædicti episcopi, quam ipse Robertus acceptaverit, respiciat.* (Brev. 11 Edw. I. 3 Pryn. 1264.)

[g] 4 Geo. IV. c. 76, s. 20.

[h] 1 & 2 Vict. c. 106, s. 6.

[i] See the bishop of Chester's case. Oxon. 1721. 'These are generally called *Lambeth* degrees.'

Powers and duties of bishops.

[382] The power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation, by ecclesiastical censures, 'and as regards his clergy, by suspension and deposition.' To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university.[j] 'But, as shall be pointed out in the third volume of these Commentaries, the powers of the ecclesiastical courts are now practically confined to matrimonial and testamentary causes; and ecclesiastical censures in order to reformation are of rare occurrence. The mode in which the bishop is to proceed against clerical offenders is now regulated entirely by the Church

Church Discipline Act.

Discipline Act, 3 & 4 Vict. c. 86. Where any clerk in holy orders is charged with any offence against the laws ecclesiastical, or concerning whom there exists scandal or evil report as having offended against those laws, the bishop of the diocese is bound, on the application of any party, or, if he thinks fit, he is authorised of his own mere motion, to issue a commission (of which notice must be given to the accused) to five persons, of whom one must be the bishop's vicar-general, or an archdeacon, or rural dean within the diocese, directing them to make inquiry as to the grounds of the charge or report. The duty of these commissioners is then to hold a public, or on the special application of the accused person, a private inquiry, by examining witnesses, as well on behalf of the accused as of the party who has instituted the proceedings. When this inquiry has been made, the commissioners publicly declare the opinion of the majority, whether there be or be not sufficient *primâ-facie* ground for adopting further proceedings, and transmit their report to the bishop, who, with the consent of the accused, may, without further proceedings, pronounce such sentence as he thinks fit, not exceeding, however, the sentence which might be pronounced in due course of law. Otherwise, on the report of the commissioners that

[j] Stat. 37 Hen. VIII. c. 17.

there is sufficient *primâ-facie* ground for instituting proceedings, and the bishop or party complaining thinks fit to proceed, articles are drawn up, and a copy served on the accused, who, after the expiration of fourteen days, is to be called on to answer them before the bishop, who may, pending the charge, inhibit the accused from performing the services of the church. If the accused then admits the truth of the articles, the bishop, or his commissary officially appointed, may pass sentence. If he does not appear, or if appearing he does not make unqualified admission of the truth of the articles, the bishop proceeds to hear and determine the cause, with the assistance of three assessors nominated by him, and pronounces sentence according to the ecclesiastical law. The bishop is empowered, however, if he thinks fit, either in the first instance, or after the report of the commissioners and before the filing of the articles, to send the case by letters of request to the court of appeal of the province, to be there heard and determined according to the law and practice of such court; and in all cases where the bishop is the patron of any preferment held by the accused, the archbishop of the province acts in his stead.[k] An appeal lies to the archbishop from the judgment pronounced by the bishop or in the court of appeal of the province, or to the queen in council[l] when the cause has been heard and determined in the first instance in the court of the archbishop. No criminal suit or proceeding against a clerk in holy orders for any offence against the laws ecclesiastical, can be instituted in any ecclesiastical court otherwise than as thus pointed out, civil rights not being however interfered with, nor does the Act affect any authority over their clergy, which the archbishops or bishops may exercise without process.'[m] It is also the business of a bishop to institute, and to direct induction to all ecclesiastical livings in his diocese, 'to execute writs of sequestration of the profits issued by the superior courts,[n] and to regulate the stipends of curates.'

Archbishoprics and bishoprics may become void by death, **How archbishoprics and bishoprics become void.**

[k] The archdeacon of Taunton's case is a recent instance of the powers thus exercised by the archbishop instead of by the bishop, See *ex parte* Denison, 4 E. & B. 292.

[l] This appeal is heard and determined by the Judicial Committee of the Privy Council: *ante*, p. 225.

[m] *Dean of York's* case, 2 Q. B. 1.

[n] See *post*, vol. iii. p. 456.

deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior.[o] Therefore a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself.[p]

II. Dean and chapter.

II. A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see.[q] When the rest of the clergy were settled in the several parishes of each diocese (as has formerly been mentioned), these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend *ten* canons or prebendaries.

Their appointment.

All ancient deans were elected by the chapter, by *congé d'élire* from the Crown, and letters missive of recommendation, in the same manner as bishops, 'but are now appointed directly by the sovereign by letters patent.'[r] In those chapters that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery has always been donative, and the installation merely by the royal letters
[383] patent.[s] The chapter, consisting of canons or prebendaries, are sometimes appointed by the Crown, sometimes by the bishop, and sometimes elected by each other.

The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary and immediate superior; and has, generally speaking, the power of visiting them, and correcting their excesses and enormities. They had also a check on the bishop at common

[o] Gibs. Cod. 822.

[p] Anciently, in the case of the incapacity of a bishop from infirmity or absence, his duties were committed to a "suffragan bishop" (1 Burn, Eccles. L. 246). But by 6 & 7 Vict. c. 62, in the event of any archbishop or bishop being incapable by reason of mental infirmity, or being found lunatic, and therefore incapable of duly performing his functions, one of the other bishops may be appointed to perform such functions, and another spiritual person to assist in the administration of the temporalities of the province or see. In the case of the bishoprics of London and Durham, the operation of this Act has been anticipated by a special Act, in pursuance of which the late bishops of those sees have resigned on being secured pensions for life. (19 & 20 Vict. c. 115.)

[q] 3 Rep. 75; Co. Litt. 103, 300.

[r] 3 & 4 Vict. c. 113, s. 24. This statute prescribes the qualifications for the office, and provides for the appointment of *minor* and *honorary* canons.'

[s] Gibs. Cod. 173.

law: for till the statute 32 Hen. VIII. c. 28, his grant or lease would not have bound his successors unless confirmed by the dean and chapter.[t]

How deaneries and prebends become void.

Deaneries and prebends may become void, like a bishopric, by death, by deprivation, or by resignation to either the Crown or the bishop.[u] Also I may here mention once for all, that if a dean, prebendary, or other spiritual person, be made a bishop, all the preferments of which he was before possessed are void; and the Crown may present to them in right of the prerogative royal. But they are not void by the election, but only by the consecration.[v]

III. Archdeacons.

III. An archdeacon has an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself; and has a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his.[w] He therefore visits the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical

IV. Rural deans.

IV. The rural deans are very ancient officers of the church,[x] but almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry. They seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and [384] to examine the candidates for confirmation, and armed, in minuter matters, with an inferior degree of judicial and coercive authority.[y]

V. Parsons and vicars.

V. The next, and indeed the most numerous, order of men, in the system of ecclesiastical polity, are the parsons and vicars of churches: in treating of whom I shall first mark out the distinction between them; shall next observe the method

[t] Co. Lit. 103; vol. ii. p. 314.

[u] Plowd. 498.

[v] Bro. Abr. tit. *Presentation*, 3, 61; Cro. Eliz. 542, 790; 2 Roll. Abr. 352; 4 Mod. 200; Salk. 137.

[w] 1 Burn, Eccl. Law, 68, 69; and see now the statute 6 & 7 Will. IV. c. 77, s. 19.'

[x] Kennett, Par. Antiq. 633.

[y] Gibs. Cod. 972, 1550.

by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, show how one may cease to be either.

Distinction between them.

A parson, *persona ecclesiæ*, is one that has full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented: and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession.[z] He is sometimes called the rector or governor of the church: but the appellation of *parson* (however it may be depreciated by familiar, clownish, and indiscriminate use) is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one (Sir Edward Coke observes), and he only, is said *vicem seu personam ecclesiæ gerere.* A parson has, during his life, the freehold in himself of the parsonage-house, the glebe, the tithes, and other dues.

But these are sometimes *appropriated;* that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtile inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incum-
[385] bent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities (the endowment of which was construed to be a work of the most exalted piety), subject to the burden of repairing the church, and providing for its constant supply. And therefore they begged and bought, for masses and obits,

[z] Co. Litt. 300.

and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence, and consent of the bishop, must first be obtained: because both the king and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to anything that shall be to the prejudice of the church. The consent of the patron also is necessarily implied: because (as was before observed) the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else, but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church.[a] When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons.[b]

This appropriation may be severed, and the church become disappropriate, two ways: as first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage: for the incumbent so instituted and inducted is to all intents and purposes complete parson: and the appropriation, being once severed, can never be reunited again, unless by a [386] repetition of the same solemnities.[c] And, when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a *sinecure;* because he has no cure of souls, having a vicar under him to whom that cure is committed.[d] Also, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation.

In this manner, and subject to these conditions, may appropriations be made at this day: and thus were most, if not all,

[a] Plowd. 496–500.
[b] Hob. 307.
[c] Co. Litt. 46.
[d] Sinecures might also be created by other means. 2 Burn, Eccl. Law, 347.

of the appropriations at present existing originally made: being annexed to bishoprics, prebends, religious houses, nay, even to nunneries and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries by statutes 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the appropriations of the several parsonages, which belonged to those respective religious houses (amounting to more than one-third of all the parishes in England),[e] would have been by the rules of the common law disappropriated, had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, &c., formerly held the same, at the time of their dissolution. This, though perhaps scarcely defensible, was not without example; for the same was done in former reigns, when the alien priories (that is, such as were filled by foreigners only) were dissolved and given to the Crown.[f] And from these two roots have sprung all the lay appropriations or secular parsonages which we now see in the kingdom; they having been afterwards granted out from time to time by the Crown.

Vicars. These appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which [387] the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and, therefore, called *vicarius* or *vicar*. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus episcopo de spiritualibus, debeat respondere*.[g] But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and, accordingly, it is enacted by statute 15 Ric. II. c. 6, that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parishes were frequently sufferers, not only by the want of divine service, but also by withholding those alms for which, among other

[e] Seld. Review of Tith. c. 9; Spelm. Apology, 35.

[f] 2 Inst. 584.

[g] Seld. Tith. c. 11, 1.

purposes, the payment of tithes was originally imposed: and therefore in this Act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and, therefore, by statute 4 Hen. IV. c. 12, it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality.[h] The endowments in consequence of these statutes have usually been by a portion of the glebe or land belonging to the parsonage, and a particular share of the tithes which the appropriators found it most troublesome to collect, and which are therefore generally called privy or small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence, the tithes of many things, as wood in particular, were formerly in some parishes rectorial, and in some vicarial rights.[i]

The distinction, therefore, of a parson and vicar is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of his profits, to whom he is in effect perpetual curate, with a standing salary. Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the statute [388]

[h] From this Act we may date the origin of the *present* vicarages; for before this time the vicar was nothing more than a temporary curate; and when the church was appropriated to a monastery, he was generally one of their own body, that is, one of the *regular* clergy; for the monks who lived *secundum regulas* of their respective houses or societies were denominated *regular* clergy, in contradistinction to the parochial clergy, who performed their ministry in the world, *in seculo*, and who from thence were called *secular* clergy.—[Christian.]

[i] 'The nature of the original endowment is now of little moment, the tithes of nearly the whole kingdom having been commuted into rent-charges.' See vol. ii. p. 30.

29 Car. II. c. 8, enacted in favour of poor vicars and curates, which rendered such temporary augmentations (when made by the appropriators) perpetual.

Appointment of parson or vicar.

The method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons,[j] is foreign to the purpose of these Commentaries; any farther than as they are necessary requisites to make a complete parson or vicar. By common law, a deacon, of any age, might be instituted and inducted to a parsonage or vicarage: but it was ordained by statute 13 Eliz. c. 12, that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived: and by statute 13 & 14 Car. II. c. 4, no person is capable to be admitted to any benefice, unless he has been first ordained a priest; and then he is, in the language of the law, a clerk in orders. 'The canons of 1603, and the rubrics in the preface to the form of ordination, which respectively prescribe that no person shall be admitted a deacon before twenty-three, or a priest before twenty-four years of age, are enforced by the statute 44 Geo. III. c. 43, s. 1, which makes the admission of persons as priests or deacons within the above ages respectively, void in law,[k] and declares any person so admitted incapable of holding any benefice or other ecclesiastical dignity whatever.' And if a person obtains orders, or a licence to preach, by money or corrupt practices (which seems to be the true, though not the common, notion of simony), the person giving such orders forfeits[l] 40*l.* and the person receiving 10*l.*, and is incapable of any ecclesiastical preferment for seven years afterwards.[m]

Holy orders.

[j] See 2 Burn, Eccl. Law, 103.

[k] The right of granting a faculty to be admitted to deacon's orders sooner (an example of which occurred in the case of George Whitfield), is limited to the archbishops of Canterbury and Armagh (44 Geo. III. c. 43). For priest's orders there can be no dispensation (Gibs. 146); for by 13 Eliz. c. 12, "none shall be admitted *minister*, being under the age of four-and-twenty years;" and minister here means one capable of all ministration, which is a priest only. (Rog. Ec. Law, *Ordination*.)

[l] Stat. 31 Eliz. c. 6.

[m] See vol. ii. p. 272.

Any clerk may be presented[n] to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall find a more convenient place to treat in the second part of these Commentaries. But when a clerk is presented, the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days.[o] Or, 2. If the clerk be unfit:[p] which unfitness is of several kinds. First, with regard to his person; as, if he be a bastard,[q] an outlaw, an excommunicate, an alien, under age, or the like.[r] Next, with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*: but if the bishop alleges only in generals, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like; it is not good cause of refusal.[s] Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal, who, being usually a layman, is not supposed to have knowledge of it; else he cannot present by lapse: but if the cause be temporal, there he is not bound to give notice.[t]

Presentation.

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If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature, and the fact admitted (as, for instance, outlawry), the judges of the courts must determine its validity, or whether it be sufficient cause of refusal: but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature (as heresy particularly alleged), the fact, if denied, shall also be de-

[n] A layman may also be presented; but he must take priest's orders before his admission. (1 Burn, 103.)

[o] 2 Roll. Abr. 355.

[p] Glan. l. 13, c. 20.

[q] Though this be classed in the books among the causes of refusal, yet such is the liberality of the present times, that no one need apprehend that his presentment would be impeded by the incontinence of his parents, or by any demerit but his own.—[CHRISTIAN.]

[r] 2 Roll. Abr. 356; 2 Inst. 632; stat. 3 Ric. II. c. 3; 7 Ric. II. c. 12.

[s] 5 Rep. 58.

[t] 2 Inst. 632.

termined by a jury; and if the fact be admitted or found, the court upon consultation and advice of learned divines shall decide its sufficiency.[u] If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient:[v] for the
[390] statute 9 Edw. II. st. 1, c. 13, is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore if the bishop returns the clerk to be *minus sufficiens in literaturâ*, the court shall write to the metropolitan to re-examine him, and certify his qualifications; which certificate of the archbishop is final.[w]

Institution.

If the bishop has no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, he (besides the usual forms) 'formerly took,' if required by the bishop, an oath of perpetual residence; for the maxim of law is, *vicarius non habet vicarium:* and, as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their constitution, and by absence to create the very mischief which they were appointed to remedy: especially as, if any profits are to arise from putting in a curate, and living at a distance from the parish, the appropriator, who is the real parson, has undoubtedly the elder title to them. 'The oath of perpetual residence can no longer be required, but other provisions have been made for

Collation.

obtaining the same result.'[x] When the ordinary is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a collation to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron: but the church is

[u] 2 Inst. 632.
[v] 5 Rep. 58; 3 Lev. 313.
[w] 2 Inst. 632.
[x] 1 & 2 Vict. c. 106, s. 61, and s. 54.

not full against the Crown till induction: nay, even if a clerk is instituted upon the Crown's presentation, the Crown may revoke it before induction, and present another clerk.[y] Upon institution, also, the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

Induction. Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other [391] clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like: and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsonee.[z]

Rights and duties of parson and vicar. The rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under the second book of these Commentaries: and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with a tolerable conciseness or accuracy. Some of them we may remark as they arise in the progress of our inquiries, but for the rest I must refer myself to such authors as have compiled treatises expressly upon this subject.[a] I shall only just mention the article of residence, upon the supposition of which the law styles every parochial minister an incumbent. By statute 21 Henry VIII. c. 13, persons wilfully absenting themselves from their benefices for one month together, or two months in the year, incurred a penalty of 5*l.* to the king, and 5*l.* to any person that sued for the same: except chaplains to the king or others therein mentioned,[b] during their at-

[y] Co. Litt. 344.

[z] Co. Litt. 300.

[a] These are very numerous; but there are few which can be relied on with certainty. Among these are Bishop Gibson's *Codex*, Dr. Burn's *Ecclesiastical Law*, and the earlier editions of the *Clergyman's Law*, published under the name of Dr. Watson, but compiled by Mr. Place, a barrister.

[b] Stat. 25 Hen. VIII. c. 16; 33 Hen. VIII. c. 28.

tendance in the household of such as retained them: and also except[c] all heads of houses, magistrates, and professors in the universities, and all students under forty years of age residing there *bonâ fide* for study. 'This statute was partially repealed by the act 57 Geo. III. c. 99. Other provisions and penalties were imposed, and both were afterwards wholly repealed by the statute 1 & 2 Vict. c. 106, amending and consolidating the laws relating to pluralities and residence. That statute enacts that if any spiritual person holding any benefice fails to keep residence on his benefice as directed by the act, except with licence or dispensation as allowed therein, he shall, when such absence exceeds three months and does not exceed six months, forfeit one-third part of the annual value of the benefice so neglected; and when such absence exceeds six months and does not exceed eight months, one-half part of such annual value; and when such absence exceeds eight months, two-thirds of such annual value; and when such absence shall have been for the whole year, three-fourth parts of the annual value. Residence, moreover, may be enforced by monition and sequestration of the living.'

[392] Legal residence is not only in the parish, but also in the parsonage-house, if there be one; for it has been resolved,[d] that the statute of Henry VIII. intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also might keep hospitality there; and if there were no parsonage-house, it was held that the incumbent was bound to hire one, in the same or some neighbouring parish, to answer the purposes of residence. For the more effectual promotion of which important duty among the parochial clergy, provisions are made by the statute '1 & 2 Vict. c. 106 (in lieu of former provisions for the same object)' for raising money upon ecclesiastical benefices, to be paid off by annually-decreasing instalments, and to be expended in rebuilding or repairing the houses belonging to such benefices.

How parsons and vicars cease to be such.

We have seen that there is but one way whereby one may become a parson or vicar: there are many ways by which one may cease to be so. 1. By death. 2. By cession, in taking another benefice. For by statute 21 Hen. VIII. c. 13,

[c] Stat. 28 Hen. VIII. c. 13.

[d] 6 Rep. 21.

if any one having a benefice of 8*l.* *per annum*, or upwards, according to the valuation in the king's books,[e] accepted any other, the first was adjudged void, unless he obtained a dispensation, which no one was entitled to have but the chaplains of the king, and others therein mentioned, the brethren and sons of lords and knights, and doctors and bachelors of divinity and law, *admitted by the universities*, of this realm; 'and now, by the above-mentioned statute 1 & 2 Vict. c. 106, as amended by the statute 13 & 14 Vict. c. 98, two benefices cannot in general be held by the same person, unless they be within three miles of each other, and the annual value of one does not exceed 100*l.*; nor, if the population of one such benefice exceeds three thousand, and of the other five hundred persons according to the last census. Exceptions exist in favour of persons holding certain cathedral preferments; but in all cases a licence or dispensation must be obtained to hold any two benefices together, and the acceptance of preferment contrary to the statute vacates the former preferment.'[f] And a vacancy thus made, for want of a dispensation, is called cession. 3. By consecration; for, as was mentioned before, when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated. There 'was formerly' a method, by the favour of the Crown, of holding such living *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the Crown to the care of a clerk, to hold till a proper pastor is provided for it. This might be temporary for one, two, or three years, or perpetual: being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. There was also a *commenda recipere*, which is, to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to [393]
the same; and this was the same to him as institution and induction are to another clerk;[g] 'but now, by the statute 6 & 7 Will. IV. c. 77, s. 18, no ecclesiastical dignity, office, or benefice can be held *in commendam* by any bishop.' 4. By resignation. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made.[h] 5. By deprivation, either, first, by sentence declaratory in the

[e] Cro. Car. 456.
[f] See also 4 & 5 Vict. c. 39; 13 & 14 Vict. c. 94.
[g] Hob. 144.
[h] Cro. Jac. 197.

ecclesiastical court, 'or under the provisions of the Church Discipline Act,'[i] for fit and sufficient causes allowed by the common law; such as attainder of treason or felony,[j] or conviction of other infamous crime in the king's courts; for heresy, infidelity,[k] gross immorality, and the like; or, secondly, in pursuance of divers penal statutes, which declare the benefice void for some nonfeasance or neglect, or else some malfeasance or crime; as, for simony,[l] 'farming or trading after two previous convictions for those offences,'[m] for maintaining any doctrine in derogation of the royal supremacy, or of the Thirty-Nine Articles, or of the Book of Common Prayer;[n] for neglecting after institution to read the Liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath;[o] for using any other form of prayer than the Liturgy of the Church of England;[p] 'for allowing the benefice to remain under sequestration for non-residence for a year, or for incurring two such sequestrations in the space of two years;'[q] or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities;[r] in all which and similar cases[s] the benefice is *ipso facto* void, without any formal sentence of deprivation; 'but in most of them, six months' notice must be given to the patron before the right of presentation lapses.'[t]

'Besides *parsons* and *vicars*, properly so called, there are numerous ministers of the church who have many of the rights, and are subject to most of the disabilities, of the beneficed clergy. These are the incumbents of districts formed from time to time under the authority and by virtue of the powers conferred on the Church Building Commissioners. By the statute 58 Geo. III. c. 45, amended by various subsequent Acts,[u] commissioners were appointed for building new

[j] Dyer, 108; Jenk. 210.

[k] Fitz. Abr. t. *Trial*, 54.

[l] 'Stat. 31 Eliz. c. 6; 12 Ann. c. 12; see also 7 & 8 Geo. IV. c. 25, and 9 Geo. IV. c. 94.'

[m] 1 & 2 Vict. c. 106, s. 31.

[n] Stat. 1 Eliz. c. 1, 2; 13 Eliz. c. 12.

[o] Stat. 13 Eliz. c. 12; 13 & 14 Car. II. c. 4; 1 Geo. I. st. 2, c. 13.

[p] Stat. 1 Eliz. c. 2.

[r] Stat. 1 W. & M. c. 26.

[s] 6 Rep. 29, 30.

[t] 44 Geo. III. c. 43.

[u] 59 Geo. III. c. 134; 3 Geo. IV. c. 72; 5 Geo. IV. cc. 36, 103; 9 Geo. IV. c. 42; 10 Geo. IV. c. 50; 1 & 2 Will. IV. c. 38; 2 & 3 Will. IV. c. 61; 3 & 4 Vict. c. 60; 4 & 5 Vict. c. 38; 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 8 & 9 Vict. c. 70; 9 & 10 Vict. c. 88; 13 & 14 Vict. c. 94;

churches in populous districts, and for dividing existing parishes, and assigning new ecclesiastical districts and determining their endowment and patronage, the recommendations of the commissioners being notified and carried into effect by orders in council.[v] In this way, not only have new districts been carved out of existing parishes, and themselves considered as original parishes;[w] but churches and chapels have in some cases been constituted the parish church, and the original parish church has become a district church or chapel of ease.'[x]

'As holy orders, presentation, institution, and induction are essential for the purpose of becoming a parson or vicar, so are they equally so for these district incumbencies; and therefore much that has been said on these subjects applies to them. It may be observed, that the Church Building Commission, although by the original Act limited to ten years, was from time to time extended;[y] but the powers of the commissioners have been recently transferred to the Ecclesiastical Commissioners.[z] Besides the alteration of existing parishes and the formation of new districts by their general powers, numerous alterations have been effected from time to time in particular instances by Acts of Parliament of a local and personal nature.'

VI. A curate is the lowest degree in the church; being in the same state that a vicar was formerly, an officiating temporary minister, instead of the proper incumbent. Though there are what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed (being for some particular reasons[a] exempted from the statute of Hen. IV.), but instead thereof, such perpetual curate is appointed by the appropriator. With regard to the other species of curates, they are the objects of some particular statutes, which ordain, that such as serve a church during its vacancy shall be paid such stipend as the ordinary thinks [394]

VI. Curates.

14 & 15 Vict. c. 42 (s. 24); 14 & 15 Vict. c. 97; 17 & 18 Vict. c. 32; 18 & 19 Vict. c. 127. (See also the statutes mentioned in the five following notes.)

[v] See the stat. 7 & 8 Vict. c. 56, ss. 5, 6.

[w] 1 & 2 Will. IV. c. 38; 11 & 12 Vict. c. 37.

[x] See the stat. 1 & 2 Vict. c. 107; 2 & 3 Vict. c. 49; 8 & 9 Vict. c. 70; 9 & 10 Vict. c. 68; 11 & 12 Vict. c. 37.

[y] 7 & 8 Geo. IV. c. 72; 7 Will. IV. and 1 Vict. c. 75; 11 & 12 Vict. c. 71; 17 & 18 Vict. c. 14.

[z] 19 & 20 Vict. c. 55: see *ante*, p. 276.

[a] 1 Burn, Eccl. Law, 427.

reasonable, out of the profits of the vacancy; or, if that be not sufficient, by the successor within fourteen days after he takes possession.[b] 'When a non-resident incumbent neglects to appoint a curate, or where the duty is inadequately performed, and also in certain large benefices having a considerable population, or more than one church attached to it, where the incumbent, after being so required, makes default in providing a curate or additional curate, as the case may be, the bishop may make the requisite appointment, and fix the stipend of the curate according to a fixed scale, proportioned to the value and population of the benefice. This stipend cannot be less than 80*l.* per annum, except in special cases; and non-resident incumbents themselves appointing curates are obliged to adhere to the same scale.[c] The bishop has also power to adjust the claims of curates for their stipends.'[d]

Thus much of the clergy, properly so called.[e] There are also certain inferior ecclesiastical officers of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers: on which officers I shall make a few cursory remarks.

VII. Church-wardens.

VII. Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish.[f] They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs.[g] They are taken, in favour of the church, to be for some purposes a kind of corporation at the common law;[h] that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be removed by the parish, and then called to account by action at the common law; but there is no method of calling them to account, but by first removing them; for none can

[b] Stat. 28 Hen. VIII. c. 11. See also *Dakins* v. *Seaman*, 9 W. & M. 777.

[c] 1 & 2 Vict. c. 106.

[d] 1 & 2 Vict. c. 106; and see *Daniel* v. *Morton*, 16 Q. B. 198.

[e] 'As to the duties of certain *lecturers* and *preachers*, see the stat. 7 & 8 Vict. c. 59.'

[f] In Sweden they have similar officers, whom they call *kiorckiowariandes*. (Stiernhook, l. 3, c. 7.)

[g] 'As to their appointment in certain churches and chapels and new parishes, see 59 Geo. III. c. 134, s. 23; 1 & 2 Will. IV. c. 38, ss. 16, 25; 6 & 7 Vict. c. 37; 8 & 9 Vict. c. 70, ss. 6, 7, & 8.

[h] Rogers' Eccl. Law, tit. *Churchwardens*.

legally do it, but those who are put in their place. As to the church, churchyard, &c., they have no sort of interest therein; but if any damage is done thereto, the parson only or vicar shall have the action. 'As to lands, however, given for the benefit of the parish, the statute 59 Geo. III. c. 12, empowers the churchwardens and overseers to hold such lands in the nature of a body corporate, and to hold also all other buildings, lands, and hereditaments belonging to the parish.' Their office also is to repair the church, and make rates and levies for that purpose; but these are recoverable only in the ecclesiastical court, 'except where the amount due from any person does not exceed 10*l*., and the validity of the rate is not disputed, for to that amount (or in the case of quakers to 50*l*.) justices of the peace have jurisdiction to order payment.'[i] They are also joined with the overseers in the care and maintenance of the poor.[j] They are empowered to keep all persons orderly [395] while in church, to which end it has been held that a churchwarden may justify the pulling off a man's hat, without being guilty of either an assault or trespass;[k] 'and formerly' they were to levy[l] a shilling forfeiture on all such as did not repair to church on Sundays and holidays. There are also a multitude of other petty parochial powers committed to their charge by divers Acts of Parliament.[m]

VIII. Parish clerks and sextons. VIII. Parish clerks and sextons are also regarded by the common law, as persons who have freeholds in their offices;[n] and therefore though they may be punished, yet they cannot be deprived by ecclesiastical censures.[o] The parish clerk was formerly very frequently in holy orders, and some are so to this day.[p] He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appears, the Court of Queen's Bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right.[q]

[i] See vol. iii. p. 95.

[j] Except in new parishes under the Church Extension Act, 6 & 7 Vict. c, 37, s. 17.

[k] *Hall* v. *Slanner*, 1 Lev. 196.

[l] Stat. 1 Eliz. c. 2, repealed by the 9 & 10 Vict. c. 59.

[m] See Lambard, of Churchwardens, at the end of his *Eirenarcha;* and Dr. Burn, tit. *Church*, *Churchwardens*, *Visitations*. 'A declaration was, by the stat. 5 & 6 Will. IV. c. 62, s. 9, substituted for their oaths of office.'

[n] *Stephenson* v. *Raine*, 2 El. & Bl. 744.

[o] 2 Roll. Abr. 234.

[p] As to parish clerks in orders, see 7 & 8 Vict. c. 59.

[q] Cro. Car, 589.

CHAPTER XII.

OF THE CIVIL STATE.

[396] THE lay part of Her Majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime.

That part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men, from the highest nobleman to the meanest peasant, that are not included under either our former division of clergy, or under one of the two latter, the military and maritime states: and it may sometimes include individuals of the other three orders: since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.

The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the bishops) one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honour.

All degrees of nobility and honour are derived from the sovereign as their fountain: and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons.[a]

Duke.

[397] 1. A *duke*, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family.[b] Among the Saxons the Latin

[a] For the origin of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *Titles of Honour*.

[b] Camden, Britan. tit. *Ordines*.

name of dukes, *duces*, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called heretoga;[c] and in the laws of Henry I. (as translated by Lambard) we find them called *heretochii.* But after the Norman Conquest, which changed the military polity of the nation, the kings themselves continuing for many generations *dukes* of Normandy, they would not honour any subjects with the title of duke, till the time of Edward III.; who, claiming to be king of France, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign created his son, Edward the Black Prince, Duke of Cornwall; and many, of the royal family especially, were afterwards raised to the like honour. However, in the reign of Queen Elizabeth, A.D. 1572,[d] the whole order became utterly extinct; but it was revived about fifty years afterwards by her successor, who was remarkably prodigal of honours, in the person of George Villiers Duke of Buckingham.

2. A *marquess, marchio*, is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom: which were called the marches, from the Teutonic word *marche*, a limit: such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons who had command there, were called lords marchers, or marquesses; whose authority was abolished by statute 27 Hen. VIII. c. 27: though the title had long before been made a mere ensign of honour; Robert Vere, earl of Oxford, being created Marquess of Dublin by Richard II. in the eighth year of his reign.[e] **Marquess.**

3. An *earl* is a title of nobility so ancient, that its origin cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons they are called *ealdormen, quasi* elder men, signifying the same as *senior* or *senator* among the Romans; and also *schiremen,* because they had each of them the civil government of a several division or **Earl.** [398]

[c] This is apparently derived from the same root as the German herzog, the ancient appellation of dukes in that country. (Seld. Tit. Hon. 2, 1, 22.)

[d] Camden. Britan. tit. *Ordines.*

[e] 2 Inst. 5.

shire. On the irruption of the Danes, they changed the name to *eorles*, which, according to Camden,[f] signified the same in their language. In Latin they are called *comites* (a title first used in the empire) from being the king's attendants: "*a societate nomen sumpserunt, reges enim tales sibi associant.*"[g] After the Norman Conquest they were for some time called *counts* or *countees*, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *earls* or *comites* is now become a mere title, they having nothing to do with the government of the county; which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or *vice-comes*. In writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him, "trusty and well-beloved *cousin*:" an appellation as ancient as the reign of Henry IV.: who being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public acts: from whence the usage has descended to his successors, though the reason has long ago failed.

Viscount.

4. The name of *vice-comes* or *viscount* was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by Henry VI., when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of Viscount Beaumont, which was the first instance of the kind.[h]

Baron.

5. A *baron's* is the most general and universal title of nobility; for originally every one of the peers of superior
[399] rank had also a barony annexed to his other titles.[i] But it has sometimes happened that, when an ancient baron has been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title has

[f] Britan. tit. *Ordines.*
[g] Bracton, l. 1, c. 8; Flet. l. 1, c. 5.
[h] 2 Inst. 5.
[i] 2 Inst. 5, 6.

subsisted without a barony: and there are also modern instances, where earls and viscounts have been created without annexing a barony to their other honours: so that now the rule does not hold universally that all peers are barons. The origin and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors, to which the name of court baron (which is the lord's court, and incident to every manor) gives some countenance. It may be collected from King John's *Magna Charta* that originally all lords of manors, or barons, that held of the king *in capite*, had seats in the great council or parliament: till about the reign of that prince the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament.[j] By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard II. first made it a mere title of honour, by conferring it on divers persons by his letters patent.[k]

How nobility is created.

Having made this short inquiry into the origin of our several degrees of nobility, I shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were (in right of those estates) allowed to be peers of the realm, and were summoned to parliament to [400] do suit and service to their sovereign: and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the House of Lords in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands:[l] and thus, in 11 Hen. VI., the possession of the castle of Arundel was adjudged to confer an earldom 'by tenure' on its possessor.[m] But afterwards,

[j] Gilb. Hist. of Exch. c. 3.
[k] 1 Inst. 9; Seld. Jan. Angl. 2, § 66.
[l] Glan. l. 7, c. 1.
[m] Seld. Tit. of Hon. b. 2, c. 9, § 5.

when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial, became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to him or his ancestors was admitted as a sufficient evidence of the tenure.

Peers are now created either by writ, or by patent: for those who claim by prescription must suppose either a writ or patent made to their ancestors; though by length of time it is lost. The creation by writ, or the Queen's letter, is a summons to attend the House of Peers, by the style and title of that barony which the sovereign is pleased to confer: that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually takes his seat in the House of Lords: and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence a hereditary barony:[n] and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it.[o] 'Although it is not unusual' to call up the eldest son of a peer to the House of Lords by writ of summons, in the name of his father's barony (because in that case there is no danger of his children's losing the nobility in case he never takes his seat; for they will succeed to their grandfather), 'an original creation by writ has been long obsolete.' Creation by writ has, 'however,' one advantage over that by patent: for a person created by writ holds the
[401] dignity to him *and his heirs,* without any words to that purport in the writ; but in letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life.[p] For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body by Elizabeth his present lady, and not to such heirs by any

[n] Whitelocke, of Parl. ch. 114. [o] Co. Litt. 16. [p] Co. Litt. 9, 16.

former or future wife. 'But the grant of a peerage for *life* merely does not make the grantee a lord of parliament.'[q]

Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the Crown, both of which we have before considered. And first we must observe, that in cases 'of treason and felony' a nobleman shall be tried by his peers.[r] The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would moreover be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by *Magna Charta*, c. 29. It is said, that this does not extend to bishops: who, though they are lords of parliament, and sit there by virtue of their baronies which they hold *jure ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility.[s] As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor Duchess of Gloucester, wife to the Lord Protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of Cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9, which declares[t] the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers: but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost.[u] Yet if a duchess dowager marries a baron, she continues a duchess still; for all the nobility are *pares*, and therefore it is [402]

The incidents of nobility.

[q] *Wensleydale Peerage*, Sess. 1855-56.

[r] 'In consequence of doubts raised on the occasion of the trial of Lord Cardigan, whether, by the stat. 7 & 8 Geo. IV. c. 28, peers were deprived of the benefit of clergy, these doubts were removed by the stat. 4 & 5 Vict. c. 22; and it was thereby enacted that every lord of parliament or peer of this realm, having place and voice in parliament, against whom any indictment for felony may be found, shall plead thereto, and shall upon conviction be liable to the same punishment as any other of her Majesty's subjects, any law or usage to the contrary in anywise notwithstanding.'

[s] 3 Inst 30, 31.

[t] Moor 769; 2 Inst. 50; 6 Rep. 52. Staundf. P. C. 152.

[u] Dyer, 79; Co. Litt. 16.

no degradation.[v] A peer, or peeress (either in her own right or by marriage) cannot be arrested in civil cases:[w] and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer sitting in judgment gives not his verdict upon oath, like an ordinary juryman, but upon his honour:[x] he answers also to bills in chancery upon his honour, and not upon his oath;[y] but, when he is examined as a witness either in civil or criminal cases, he must be sworn:[z] for the respect, which the law shows to the honour of a peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis.*[a] The honour of peers is however so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum,* and subjected to peculiar punishments by divers ancient statutes.[b]

How nobility may be lost.

A peer cannot lose his nobility, but by death or attainder; though there was an instance in the reign of Edward the Fourth of the degradation of George Nevile Duke of Bedford, by Act of Parliament,[c] on account of his poverty, which rendered him unable to support his dignity.[d] But this is a singular instance: which serves at the same time, by having happened, to show the power of parliament; and, by having happened but once, to show how tender the parliament has been in exerting so high a power. It has been said indeed,[e] that if a baron wastes his estate, so that he is not able to support the degree, the *king* may degrade him; but it is expressly held by later authorities,[f] that a peer cannot be degraded but by Act of *Parliament.*

Of the commonalty.

[403]

The commonalty, like the nobility, are divided into several degrees; and as the lords, though different in rank, yet all of

[v] 2 Inst. 50.

[w] Finch, L. 355; 1 Vent. 298.

[x] 2 Inst. 49.

[y] 1 P. Wms. 146.

Salk. 512.

Cro. Car. 64.

3 Edw. I. c. 34; 2 Ric. II. st. 1, c. 12 Ric. II. c. 11.

[c] 4 Inst. 355.

[d] The preamble to the Act is remarkable: "Forasmuch as oftentimes it is "seen, that when any lord is called to "high estate, and hath not convenient "livelihood to support the same dig-"nity, it induceth great poverty and "indigence, and causeth oftentimes "great extortion, embracery, and main-"tenance to be had, to the great trouble "of all such countries where such estate "shall happen to be: therefore," &c.

[e] Moor. 678.

[f] 12 Rep. 107; 12 Mod. 56.

them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility.[g]

The first name of dignity, next beneath a peer, was anciently that of *vidames, vice-domini*, or *valvasors*:[h] who are mentioned by our ancient lawyers[i] as *viri magnæ dignitatis;* and Sir Edward Coke[j] speaks highly of them. Yet they are now quite out of use; and our legal antiquaries are not agreed upon even their origin or ancient office. Vidames.

Now, therefore, the first personal dignity, after the nobility, is a *knight* of the order of St. George, or *of the Garter;* first instituted by Edward III. A.D. '1348.'[k] Next (but not till after certain *official* dignities, as privy councillors, the chancellors of the exchequer and duchy of Lancaster, the chief justice of the Queen's Bench, the master of the rolls, and the other English judges) follows a *knight banneret;* who indeed by statutes 5 Ric. II. st. 2, c. 4, and 14 Ric. II. c. 11, is ranked next after barons; and his precedence before the younger sons of viscounts was confirmed to him by order of King James I., in the tenth year of his reign.[l] But in order to entitle himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war.[m] Else he ranks after *baronets;* who are the next order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by King James I., A.D. 1611; in order to raise a competent sum for the reduction of the province of Ulster in Ireland; for which reason all baronets have the arms of Ulster superadded to their family coat.[n] Next follow *knights of the Bath;* an order instituted by King Henry IV. and revived by King George I. 'in 1725.' They are so called from the ceremony 'formerly but not now observed' of bathing the night before their creation.[o] The last of these inferior nobility are *knights bachelors;* the most ancient Knights. [404]

[g] 2 Inst. 29.

[h] Camden. Britan. tit. *Ordines.*

[i] Bracton, l. 1, c. 8.

[j] 2 Inst. 667.

[k] Seld. Tit. of Hon. b. 2, c. 5, § 14; 'Sir H. Nicolas's Orders of Knighthood; *Archæologia*, vol. xxxi. p. 1.'

[l] Seld. Tit. of Hon. b. 2, c. 11, § 3.

[m] 4 Inst. 6.

[n] 'A hand *gules* in a field *argent.*'

[o] 'For the constitution and statutes of this order of knighthood, see the London Gazettes of 25th May, 1847, and 16th August, 1850.'

though the lowest order of knighthood amongst us; for we have an instance[p] of King Alfred's conferring this order on his son Athelstan. The custom of the ancient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's household; after it, as part of the community.[q] Hence some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati: aurati* from the gilt spurs they wore; and *equites* because they always served on horseback: for it is observable,[r] that almost all nations call their knights by some appellation derived from a horse.[s] They are also called in our law *milites*, because they formed a part of the royal army, in virtue of their feudal tenures; one condition of which was, that every one who held a knight's fee immediately under the Crown (which in Edward II.'s time[t] amounted to 20*l. per annum*) was obliged to be knighted, and attend the king in his wars, or pay a fine for his non-compliance. The exertion of this prerogative as an expedient to raise money in the reign of Charles I., gave great offence; though warranted by law, and the recent example of Queen Elizabeth; but it was by the statute 16 Car. I. c. 16, abolished; and this kind of knighthood has, since that time, fallen into great disregard.

Colonels, serjeants-at-law, and doctors.

[405]

These, Sir Edward Coke says,[u] are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last the heralds rank all colonels, serjeants-at-law, and doctors in the three learned professions.[v]

p Will. Malmsb. lib. 2.

q Tac. de Morib. Germ. 13.

r Camb. Brit. *ordines*; Co. Litt. 74.

s It does not appear that the English word *knight* has any reference to a horse; for knight, or cniht in the Saxon, signifies puer, servus, or attendant. See Seld. Tit. of Hon. b. 2, c. 5, § 33. – [CHRISTIAN.]

t Stat. de milit. 1 Edw. II.

u 2 Inst. 667.

v The rules of precedence in England may be reduced to the following table, in which those marked * are entitled to the rank here allotted them, by stat. 31 Hen. VIII. c. 10; marked †, by stat. 1 W. & M. c. 22; marked ||, by letters patent, 9, 10, & 14 Jac. I., which see in Seld. Tit. of Hon. II. 5, 46, and II. 11, 3; marked ‡, by ancient usage and established custom; for which see (among others) Camden's Britan. tit. *Ordines*. Milles's Catalogue of Honour, edit. 1610, and Chamberlayne's Present State of England, p. 3, ch. iii.

[TABLE OF PRECEDENCE.

Esquires and gentlemen are confounded together by Sir Edward Coke, who observes, that every esquire is a gentle- *Esquires and gentlemen.*

TABLE OF PRECEDENCE.

* The Prince Consort (1).
* The Sovereign's children and grand-children.
* ———— brethren.
 uncles.
* ———— nephews.
* Archbishop of Canterbury (2).
* Lord Chancellor or Keeper, if a baron.
* Archbishop of York.
* Lord Treasurer,
* Lord President of the Council,
* Lord Privy Seal,
* Lord Great Chamberlain. (But see private stat. 1 Geo. I. c. 3.)
* Lord High Constable.
* Lord Marshal.
* Lord Admiral.
* Lord Steward of the Household.
* Lord Chamberlain of the Household.
* Dukes.
* Marquesses.
‡ Dukes' eldest sons.
* Earls.
‡ Marquesses' eldest sons.
‡ Dukes' younger sons.
* Viscounts.
‡ Earls' eldest sons.
‡ Marquesses' younger sons.
* Secretary of State, if a bishop.
* Bishop of London.
* ———— Durham.
* ———— Winchester.
* Bishops.
* Secretary of State, if a baron.
* Barons.
† Speaker of the House of Commons.
† Lords Commissioners of the Great Seal.
‡ Viscounts' eldest sons.
‡ Earls' younger sons.
‡ Barons' eldest sons.
|| Knights of the Garter.
|| Privy Councillors.
|| Chancellor of the Exchequer.
|| Chancellor of the Duchy.
|| Lord Chief Justice of the Queen's Bench.
|| Master of the Rolls.
|| Chief Justice of the Common Pleas.
|| Chief Baron of the Exchequer.
|| Lords Justices of the Court of Appeal in Chancery (3).
|| Vice-Chancellors (4).
|| Judges and Barons of the Coif.
|| Knights Bannerets Royal.
|| Viscounts' younger sons.
|| Baron's younger sons.
|| Baronets.
|| Knights Bannerets.
‡ Knights of the Bath.
‡ Serjeants-at-law (5).
‡ Knights Bachelors.
|| Baronets' eldest sons.
|| Knights' eldest sons.
|| Baronets' younger sons.
|| Knight's younger sons.
‡ Colonels.
‡ Doctors.
‡ Esquires.
‡ Gentlemen.
‡ Yeomen.
‡ Tradesmen.
‡ Artificers.
‡ Labourers.

N.B. Married women and widows are entitled to the same rank among each other as their husbands would respectively have borne between themselves, except such rank is merely professional or official; and unmarried women to the same rank as their eldest brothers would bear among men during the lives of their fathers.

(1) '*London Gazette*, March, 1840. The rank there assigned to Prince Albert is, however, only enjoyed by courtesy.' (Dod's Peerage for 1856, p. 37.)

(2) It is said that before the Conquest, by a constitution of Pope Gregory; the two archbishops were equal in dignity, and in the number of bishops subject to their authority, and that William the Conqueror thought it prudent to give precedence and superiority to the archbishop of Canterbury; but Thomas archbishop of York was unwilling to acknowledge his inferiority to Laufranc archbishop of Canterbury, and appealed to the pope, who referred the matter to the king and barons; and in a council held at Windsor Castle they decided in favour of the archbishop of Canterbury (Godw. Comm. de Præsul. 665). But the archbishop of York long afterwards refused to acquiesce in this decision, for Bishop Godwin relates a curious and ludicrous struggle which took place in the reign of Henry II., above one hundred years afterwards, between Roger archbishop of York and Richard archbishop of Canterbury, for the chair on the right hand of the pope's legate (Ibid. 79). Perhaps to this decision, and their former equality, we may refer the present distinction between them, viz., that the archbishop of Canterbury is primate of all England, and the archbishop of York is primate of England.—[CHRISTIAN.]

(3) 14 & 15 Vict. c. 83, s. 3.

(4) 5 Vict. c. 5.

(5) 'Mr. Serjeant Manning's *Serviens ad Legem*, p. 263. Sir William Blackstone places Serjeants immediately after Colonels.'

man, and a gentleman is defined to be one *qui arma gerit*,[w] who bears coat armour, the grant of which adds gentility to a man's family; in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real *esquire;* for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them:[x] 1. The eldest sons of knights, and their eldest sons in perpetual succession.[y] 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession: both which species of esquires Sir Henry Spelman entitles *armigeri natalitii*.[z] 3. Esquires created by the king's letters patent or other investiture, and their eldest sons. 4. Esquires by virtue of their offices: as justices of the peace, and others who bear any office of trust under the Crown. To these may be added 'barristers-at-law,'[a] and the esquires of knights of the bath, each of whom constitutes three at his installation: and all foreign 'noblemen;' for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings.[b] As for *gentlemen*, says Sir Thomas Smith,[c] they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and (to be short) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. A *yeoman* is he that hath free land of forty shillings by the year; who was anciently thereby qualified to serve on juries, vote for knights of the shire, and do any other act, where the law requires one that is *probus et legalis homo*.[d]

Yeomen.

[407]

Tradesmen, artificers, and labourers.

The rest of the commonalty are *tradesmen, artificers*, and *labourers;* who (as well as all others) were required by the statute 1 Hen. V. c. 5, to be styled by the name and addition

w 2 Inst. 668.
x 2 Inst. 668.
y 2 Inst. 667.
z Gloss. 43.
a *Rex* v. *Brough, Esq.* 1 Wils. 244.
b 3 Inst. 30; 2 Inst. 667.
c Commonw of England, b. 1, c. 20.
d 2 Inst. 668.

of their estate, degree, or mystery, and the place to which they belonged or where they had been conversant, in all original writs of actions personal, appeals, and indictments, upon which process of outlawry might be awarded; in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process. 'Now, however, no indictment, information,[e] writ or pleading, is vitiated by the omission of such addition.'

[e] 14 & 15 Vict. c. 100.

CHAPTER XIII.

OF THE MILITARY AND MARITIME STATES.

[408] THE military state includes the whole of the soldiery, or such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm.

In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear; but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws, therefore, and constitutions of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war: and it was not till the reign of Henry VII. that the kings of England had so much as a guard about their persons.[a]

Yeomen of the guard.

[409] On the Saxon military force.

In the time of our Saxon ancestors, as appears from Edward the Confessor's laws,[b] the military force of this kingdom was in the hands of the dukes or heretochs, who were constituted through every province and county in the kingdom: being taken out of the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi.*" Their duty was to lead and regulate the English armies, with a very unlimited power; "*prout eis visum fuerit, ad honorem coronæ et utilitatem regni.*" And because of this great power they were elected by the people in their full assembly, or folkmote,

[a] The yeomen of the guard, established by Hen. VII. in 1485, are to be considered more as the king's domestic servants than as soldiers. Their number was at first fifty, and seems never to have exceeded two hundred. (Hallam, Con. Hist. vol. ii. ch. ix.)

[b] c. *de heretochiis.*

in the same manner as sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was intrusted with such power, as if abused might tend to the oppression of the people, that power was delegated to him by a vote of the people themselves.[c] So too, among the ancient Germans, the ancestors of our Saxon forefathers, they had their dukes as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: for so only can be consistently understood that passage of Tacitus,[d] "*reges ex nobilitate, duces ex virtute sumunt;*" in constituting their kings, the family or blood-royal was regarded, in choosing their dukes or leaders, warlike merit: just as Cæsar relates of their ancestors in his time, that whenever they went to war, by way either of attack or defence, they *elected* leaders to command them.[e] This large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown; and accordingly we find a very ill use made of it by Edric Duke of Mercia, in [410] the reign of King Edmund Ironside, who, by his office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at last transferred the crown to Canute the Dane.

It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers; but we are unfortunately left in the dark as to the particulars of this his so-celebrated regulation; though, from what was last observed, the dukes seem to have been left in possession of too large and independent a power; which enabled Duke Harold, on the death of Edward the Confessor, though a stranger to the royal blood, to mount, for a short space, the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir.

c "*Isti vero viri eliguntur per commune concilium, pro communi utilitate regni, per provincias et patrias universas, et per singulos comitatus in pleno folkmote, sicut et vicecomites provinciarum et comitatuum eligi debent.*" (LL. Edward the Confessor, 1 Thorpe, p. 456. See also Bede, Ecclesiastical History, l. 5, c. 10.)

d De Morib. Germ. 7.

e "*Quum bellum civitas aut illatum defendit aut infert, magistratus qui ei bello præsint deliguntur.*" (De Bell. Gall. l. 6, c. 22.)

On the military part of the feudal system.

Upon the Norman Conquest the feudal law was introduced here in all its rigour, the whole of which is built on a military plan. I shall not now enter into the particulars of that constitution, which belongs more properly to the next part of our Commentaries; but shall only observe, that in consequence thereof all the lands in the kingdom were divided into what were called knight's fees, in number above sixty thousand; and for every knight's fee a knight or soldier, *miles*, was bound to attend the king in his wars, for forty days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious. By this means the king had, without any expense, an army of sixty thousand men always ready at his command. And, accordingly, we find one, among the laws of William the Conqueror,[f] which in the king's name commands and firmly enjoins the personal attendance of all knights [41[illegible]] and others; "*quod habeant et teneant se semper in armis et equis, ut decet et oportet: et quod semper sint prompti et parati ad servitum suum integrum nobis explendum et peragendum, cum opus adfuerit, secundum quod debent de feodis et tenementis suis de jure nobis facere.*" This personal service in process of time degenerated into pecuniary commutations or aids, and at last even the military tenures of the feudal system were abolished at the Restoration, by statute 12 Car. II. c. 24.

On the statutes of armour.

In the meantime, we are not to imagine that the kingdom was left wholly without defence in case of domestic insurrections, or the prospect of foreign invasions. Besides those who by their military tenures were bound to perform forty days' service in the field, first the assize of arms, enacted[g] 27 Hen. II. and afterwards the statute of Winchester,[h] under Edward I. obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace: and constables were appointed in all hundreds by the latter statute to see that such arms were provided. These weapons were changed by the statute 4 & 5 Ph. & M. c. 2, into others of more modern service; but both this and the former provisions were repealed in the reign of James I.[i] While these continued in force, it

[f] Co. Litt. 75, 76.

[g] Hoved. A.D. 1181.

[h] 13 Edw. I. c. 6.

[i] Stat. 1 Jac. I. c. 25; 21 Jac. I. c. 28.

was usual from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide to muster and array (or set in military order) the inhabitants of every district; and the form of the commission of array was settled in Parliament in the 5 Hen. IV., so as to prevent the insertion therein of any new penal clauses.[j] But it was also provided,[k] that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should provide soldiers unless by consent of Parliament. About the reign of King Henry VIII., or his children, lieutenants began [412] to be introduced,[l] as standing representatives of the Crown, to keep the counties in military order; for we find them mentioned as known officers in the statute 4 & 5 Ph. & M. c. 3, though they had not then been long in use, for Camden speaks of them[m] in the time of Queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger; but the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

The militia under Charles I.

In this state things continued, till the repeal of the statutes of armour in the reign of King James I.: after which, when King Charles I. had, during his northern expeditions, issued commissions of lieutenancy, and exerted some military powers, which, having been long exercised, were thought to belong to the Crown, it became a question in the Long Parliament, how far the power of the militia did inherently reside in the king; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament: the two Houses

[j] Rushworth, part 3, pp. 662, 667; see 8 Rym. 374, &c.

[k] Stat 1 Edw. III. st. 2, cc. 5, 7; 25 Edw. III. st. 5, c. 8, 'recited and confirmed by the 4 Hen. IV. c. 13; see Hallam, Con. Hist. vol. ii. ch. ix.'

[l] 15 Rym. 75.

[m] Brit. 103, edit. 1594. This great office was first created in the third year of Edward VI., in consequence of the many disturbances in several counties by the followers of the old religion against the new establishment. It seems in its first institution to have been as much civil and judicial as military. The first commissions styled the lord-lieutenants the king's justices as well as lieutenants, and they were to inquire of all treasons, &c. (Strype's Eccles. Mem. 2, 178.)—[Coleridge.]

not only denying this prerogative of the Crown, the legality of which perhaps might be somewhat doubtful; but also seizing into their own hands the entire power of the militia, of the illegality of which step there could never be any doubt at all.

The abolition of military tenures.

Soon after the restoration of King Charles the Second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the Crown to govern and command them, and to put the whole into a more regular method of military subordination;[n] and the order in which the militia now stands by law is
[413] principally built upon the statutes which were then enacted. It is true the two last of them are apparently repealed; but many of their provisions are re-enacted, with the addition of some new regulations, by the present militia laws; the general scheme of which is to discipline a certain number of the inhabitants of every county, 'formerly' chosen by 'ballot' for three, 'and subsequently for five' years; 'the person so chosen or drawn being compelled to serve or procure a substitute. For the last quarter of a century the militia force, whenever called out, has been sufficiently supplied with volunteers, without having recourse to the compulsory process of the ballot, the right to put in force which has been from time to time suspended by special Acts of Parliament.[o] The militia regiments were formerly' officered by the lord-lieutenant, the deputy-lieutenants, and other principal landholders, under a commission from the Crown, 'a certain qualification in real property being required for each rank. The property qualification of officers below the rank of captain was abolished by the statute 15 & 16 Vict. c. 50, and personal estate was at the same time made a sufficient qualification for deputy-lieutenants, captains, and officers of higher rank.' The militia are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm (or any of its dominions or territories),[p] nor in any case compellable to march out of the kingdom. 'During the recent war with Russia, however, an Act was passed to enable Her Majesty to accept the services of the militia out of the United King-

The present militia laws.

[n] 13 Car. II. st. 1, c. 6; 13 & 14 Car. II. c. 3; 15 Car. II. c. 4.

[o] 'See the stat. 10 Geo. IV. c. 10; and 19 & 20 Vict. c. 52, and various intermediate Acts.'

[p] Stat. 42 Geo. III. c. 90.

dom.'[q] They are to be exercised at stated times: and their discipline in general is liberal and easy; but when drawn out into actual service, they are subject to the rigour of 'the Mutiny Act, noticed hereafter, and the articles of war framed under its authority,' as necessary to keep them in order.[r] This is the constitutional security which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence.[s]

On the regular troops.

When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes,[t] in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for [414] all persons to receive justice according to the laws of the land. Wherefore Thomas Earl of Lancaster being condemned at Pontefract, 15 Edw. II., by martial law, his attainder was reversed 1 Edw. III., because it was done in time of peace.[u] And it is laid down,[v] that if a lieutenant, or other that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder: for it is against *Magna Charta*.[w] The Petition of

[q] 18 & 19 Vict. c. 1.

[r] 'An annual Act is passed to defray the charge of the payment of the disembodied militia, and to grant allowances to officers. See, for instance, 19 & 20 Vict. c. 90.'

[s] 'The following are the existing Acts relating to the militia, independently of the periodical and other Acts referred to in the text:—1 Geo. I. st. 2, c. 14; 19 Geo. III. c. 44; 42 Geo. III. c. 90; 43 Geo. III. cc. 10, 19, 50, 71, 72, 100; 44 Geo. III. c. 56: 46 Geo. III. cc. 91, 140; 47 Geo. III. sess. 2, c. 71; 50 Geo. III. c. 92; 51 Geo. III. cc. 20, 109, 118; 52 Geo. III. c. 155. s. 9; 53 Geo. III. cc. 81, 91; 54 Geo. III. c. 11; 55 Geo. III. cc. 65, 168; 56 Geo. III. c. 64; 57 Geo. III. c 57; 7 Will. IV. and 1 Vict. c. 33 (s. 12); 2 & 3 Vict. c. 59; 17 & 18 Vict. c. 105; 18 & 19 Vict. c. 57.'

[t] Hist. C. L. c. 2.

[u] 2 Brad. Append. 59.

[v] 3 Inst. 52.

[w] Cap. 29.

Right[x] moreover enacts, that no soldier shall be quartered on the subject without his own consent: and that no commission shall issue to proceed within this land according to martial law. And whereas, after the Restoration, King Charles II. kept up about five thousand regular troops, by his own authority, for guards and garrisons; which King James II. by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the articles of the Bill of Rights,[y] that the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of parliament, is against law.

Origin of our standing army.

But, as the fashion of keeping standing armies (which was first introduced by Charles VII. in France, A.D. 1445[z]) has long universally prevailed over Europe (though some of its potentates, being unable themselves to maintain them, are obliged to have recourse to richer powers, and receive subsidiary pensions for that purpose), it has also for many years past been annually judged necessary by our legislature for the safety of the kingdom, the defence of the possessions of the Crown of Great Britain, and the preservation of the balance of power in Europe, to maintain even in time of peace a
[415] standing body of troops, under the command of the Crown; who are however *ipso facto* disbanded at the expiration of every year, unless continued by parliament.

To prevent the executive power from being able to oppress, says Baron Montesquieu,[a] it is requisite that the armies with which it is intrusted should consist of the people, and have the same spirit with the people; as was the case at Rome till Marius new-modelled the legions by enlisting the rabble of Italy, and laid the foundation of all the military tyranny that ensued. Nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. Like ours, it should wholly be composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people; no separate camp, no barracks, no inland fortresses should be allowed. And perhaps it

[x] 3 Car. I. c. 1; see also 31 Car. II. c 1.
[y] Stat. 1 W. & M. st. 2, c. 2.
[z] Robertson, Cha. V. i. 94.
[a] Sp. L. 11, 6.

might be still better, if, by dismissing a stated number, and enlisting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the soldier be more intimately connected together.

The annual Mutiny Act.

To keep this body of troops in order, an annual Act of Parliament likewise passes, "for punishing mutiny and desertion, "and for the better payment of the army and their quarters."[b] 'This statute commences with the important recital, that "the raising or keeping a standing army within the United "Kingdom of Great Britain and Ireland in time of peace, "unless it be with the consent of parliament, is against law;" but that it is adjudged necessary by the sovereign and parliament, that a body of forces should be continued for the safety of the kingdom, the defence of the possessions of the Crown, and the preservation of the balance of power in Europe. The statute next limits the number of forces, and after further reciting that "no man can be prejudged of life or limb, or "subjected in time of peace to any kind of punishment within "this realm, by martial law, or in any other manner than by "judgment of his peers, and according to the known and "established laws of this realm; yet, nevertheless, it being "requisite, for the retaining all the before-mentioned forces "in their duty, that an exact discipline be observed, and that "soldiers who shall mutiny or stir up sedition, or shall desert "Her Majesty's service, or be guilty of crimes and offences "to the prejudice of good order and military discipline, be "brought to more exemplary and speedy punishment than "the usual forms of the law will allow;" it proceeds to confer power on the sovereign to make "articles of war for the better government of the forces;" with the limitation that no person shall by such articles of war be subject to be transported as a felon, or to be sentenced to penal servitude, or to suffer any punishment extending to life or limb, except for crimes which are expressly made punishable in this way, by the statute itself.'

'After enumerating the persons subject to its provisions, the

[b] See, for instance, 19 & 20 Vict. c. 10. Thus, "The king retains the power of the sword, but the parliament retains that of the purse, so that they must *both* agree to draw the sword, or else leave it in the scabbard, which is the best place for it." (Whitelocke, Mem.)

Courts martial. statute then proceeds to authorize the erecting of courts martial, which are to be constituted and held in the manner prescribed by the Act. The procedure on trials by these tribunals, the examination of witnesses on oath, and the preservation of the sentences of the court are carefully provided for.'

'The jurisdiction is to try and punish offences against the articles of war, and the provisions of the statute itself, by
[416] which,' among other things, it is enacted, that if any officer or soldier shall excite or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall desert Her Majesty's service, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands: such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself.

'The statute provides for the trial by court martial of any paymaster or commissioned officer who embezzles, steals, or wilfully misapplies money, provisions, ammunition, or other stores, and for the punishment of any such offence by transportation, penal servitude, fine, or imprisonment; and it confers express powers on courts martial, either in addition to imprisonment or without it, to sentence any soldier to corporal punishment (not extending to life or limb), and not exceeding fifty lashes, for disgraceful conduct, misbehaviour, or neglect of duty; to order the forfeiture of pay, and to mark deserters, for whose apprehension and detainer, by summary proceedings before justices, full powers are given. Minute regulations are made by the statute as to the enlistment and attesting of recruits, and for the billeting of troops and the supply of carriages, the enactments of the Petition of Right being suspended in that respect.'

'The object of the Mutiny Act, therefore, is to create a court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers, and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the legislature to the Crown to make articles of war, these articles are to be for the better government of the forces, and can extend no further than they are thought necessary to the

regularity and discipline of the army. To these courts "all "persons who are or shall be commissioned or in pay, as an "officer, or who are or shall be listed or in pay as a non-com-"missioned officer or soldier" are amenable in respect of all matters specified in the articles of war; offences against which can only be tried by courts martial, the courts of common law having no power to interfere to protect the soldier, so long as these tribunals do not exceed their jurisdiction.'[c]

However expedient the most strict regulations may be in time of actual war, yet in times of profound peace a little relaxation of military rigour would not, one should hope, be productive of much inconvenience. And, upon this principle, though by our standing laws[d] (still remaining in force, though not attended to) desertion in time of war is made a capital felony, and the offence is triable by a jury and before justices at the common law; yet, by our militia laws before mentioned, a much lighter punishment is inflicted for desertion in time of peace. So, by the Roman law also, desertion in time of war was punished with death, but more mildly in time of tranquillity.[e] But our Mutiny Act makes no such distinction: for any of the faults above mentioned are equally at all times punishable with death itself, if a court martial shall think proper. This discretionary power of the court martial is indeed to be guided by the directions of the Crown; which, with regard to military offences, has almost an absolute legislative power. "Her Majesty," says the Act, "may make "articles of war for the better government of Her Majesty's "forces, which shall be judicially taken notice of by all "judges and in all courts whatsoever." A vast and most important trust! an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb. These are indeed forbidden to be inflicted, except for crimes declared [417] to be so punishable by this Act; which crimes we have just enumerated, and among which, we may observe that any disobedience to lawful commands is one. Perhaps in some future revision of this Act, which is in many respects hastily penned, it may be thought worthy the wisdom of Parliament to ascertain the limits of military subjection, and to enact

The power of the Crown.

c See the judgment of Lord Loughborough in the case of *Grant* v. *Gould*, 2 Hen. Bl. 69.

d Stat. 18 Hen. VI. c. 19; 2 & 3 Edw. VI. c. 2.

e Ff. 49, 16, 28.

express articles of war for the government of the army, as is done for the government of the navy; especially as, by our present constitution, the nobility and gentry of the kingdom, who serve their country as militia officers, are annually subjected to the same arbitrary rule during their time of exercise.

On military law. One of the greatest advantages of our English law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious: nothing is left to arbitrary discretion; the sovereign by his judges dispenses what the law has previously ordained; but is not himself the legislator. How much therefore it is to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen! for Sir Edward Coke will inform us,[f] that it is one of the genuine marks of servitude to have the law, which is our rule of action, either concealed or precarious; "*misera est servitus ubi jus est vagum aut incognitum.*" Nor is this state of servitude quite consistent with the maxims of sound policy observed by other free nations. For the greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as Baron Montesquieu observes,[g] seeing the liberty which others possess, and which they themselves are excluded from, are apt (like eunuchs in the eastern seraglios) to live in a state of perpetual envy and hatred towards the rest of the community; and indulge a malignant pleasure in contributing to destroy those privileges to which they can never be ad-
[418] mitted. Hence have many free states, by departing from this rule, been endangered by the revolt of their slaves: while in absolute and despotic governments, where no real liberty exists, and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are therefore advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen. Much less ought the soldiery to be an ex-

[f] 4 Inst. 332.

[g] Sp. L. 15, 12.

ception to the people in general, and the only state of servitude in the nation.

'The time of service in the army is now limited to ten years in the infantry, and twelve years in the cavalry, the Queen in council having power to lessen such periods.[h] But' as soldiers by the Mutiny Act are thus put in a worse condition than any other subjects, so, by the humanity of our standing laws, they are in some cases put in a much better. By statute 43 Eliz. c. 3, a weekly allowance was granted, to be raised in every county for the relief of soldiers sick, hurt, and maimed;[i] 'and although this particular statute has been repealed, such soldiers are by various acts now entitled to pensions;' nor must the royal hospital at Chelsea, for such as are worn out in their duty, be forgotten.[j] 'By the annual Mutiny Act, soldiers cannot be taken on any process or execution, except for indictable offences, or for debts amounting to 30*l.* exclusive of costs; and' any soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases.[k] Our law does not indeed extend this privilege so far as the civil law; which carried it to an extreme that borders upon the ridiculous. For if a soldier, in the article of death, wrote anything in bloody letters on his shield, or in the dust of the field with the sword, it was a very good military testament.[l]

'Finally, to encourage habits of frugality, military savings' banks have been recently established for the soldiers, and other facilities given for their education and amusement.'[m]

[h] 10 & 11 Vict. c. 37; 12 & 13 Vict. c. 73; 18 & 19 Vict. c. 4.

[i] 'Before the statute 5 & 6 Will. IV. c. 76, s. 14, abolishing all exclusive rights of trading in boroughs,' officers and soldiers, who had been in the king's service, were, by several statutes enacted at the close of several wars, at liberty to use any trade or occupation they were fit for, in any town in the kingdom (except the two universities), notwithstanding any statute, custom, or charter to the contrary. See 3 Geo. III. c. 8; 24 Geo. III. st. 2, c. 6; 42 Geo. III. c. 69; and 56 Geo. III. c. 67.

[j] 47 Geo. III. st. 2, c. 25; 55 Geo. III. cc. 125, 136; 7 Geo. IV. c. 16; 2 & 3 Will. IV. c. 106; 5 & 6 Vict. c. 70; 6 & 7 Vict. cc. 31, 95; 9 & 10 Vict. cc. 9, 10; 10 & 11 Vict. cc. 4, 54, 11 & 12 Vict. cc. 88, 103.

[k] Stat. 29 Car. II. c. 3; 5 & 6 W. & M. c. 21, § 6; 55 Geo. III. c. 104; 7 Will. IV. and 1 Vict. c. 26.

[l] *Si milites quid in clypeo literis sanguine suo rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo ipso tempore quo, in prælio, vitæ sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet.* (Cod. 6, 21, 15.)

[m] 5 & 6 Vict. c. 71; 8 & 9 Vict. c. 27; 12 & 13 Vict. c. 71.

'Besides the militia and regular army, corps of yeomanry and volunteers were organized during the war with France, and several of the former are now annually mustered for a short period in various counties of England for the purpose of exercise and drill.'[n]

'Although it is against the spirit of our constitution to admit foreign troops into this country,[o] an Act was passed at the commencement of the present reign, to enable Her Majesty to grant the rank of general officers to foreigners then bearing the Queen's commission, and to permit the enlistment of foreigners, not exceeding the proportion of one in fifty, into the army; such last-mentioned foreigners, however, being incapable of holding higher rank than that of a non-commissioned officer.[p] During the recent war with Russia, moreover, foreign legions, consisting of German and Italian soldiers, were enlisted under an Act passed for that purpose, after considerable debate and opposition in parliament.'[q] And thus much for the military state, as acknowledged by the laws of England.

[419] Of the maritime state.

The *maritime* state is nearly related to the former. The royal navy of England has ever been its greatest defence and ornament; it is its ancient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the Laws of Oleron, and are received by all nations in Europe as the ground and substruction of all their marine constitutions, was confessedly compiled by our King Richard I at the Isle of Oleron, on the coast of France, then part of the possessions of the Crown of England.[r] And yet, so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign of Queen Elizabeth, Sir Edward Coke[s] thinks it matter of boast, that the royal navy of England then consisted of *three-and-thirty* ships.

[n] 44 Geo. III. c. 54; 44 Geo. III. c. 94; 46 Geo. III. c. 125; 56 Geo. III. c. 39; 57 Geo. III. c. 44; 7 Geo. IV. c. 58.

[o] See *ante*, p. 420.

[p] Stat. 7 Will. IV. and 1 Vict. c. 29.

[q] Stat. 18 & 19 Vict. c. 2.

[r] 4 Inst. 144; Coutumes de la Mer, 2.

[s] 4 Inst. 50.

The Navigation Acts.

The flourishing condition of our marine 'has been from time to time attributed' to the provisions of the statutes called the Navigation Acts;[t] whereby, 'it was said,' the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary. By the statute 5 Ric. II. c. 3, in order to augment the navy of England, then greatly diminished, it was ordained, that none of the king's liege people should ship any merchandize out of or into the realm but only in ships of the king's ligeance, on pain of forfeiture. In the next year, by statute 6 Ric. II. c. 8, this provision was enervated, by only obliging the merchants to give English ships (if able and sufficient) the preference. But one of the most important statutes for the trade and commerce of these kingdoms was that Navigation Act, the rudiments of which were first framed in 1650,[u] with a narrow partial view: being intended to mortify our own sugar islands, which were disaffected to the parliament, and still held out for Charles II., by stopping the gainful trade which they then [420] carried on with the Dutch;[v] and at the same time to clip the wings of those our opulent and aspiring neighbours. This prohibited all ships of foreign nations from trading with any English plantations without license from the council of state. In 1651,[w] the prohibition was extended also to the mother-country: and no goods were suffered to be imported into England, or any of its dependencies, in any other than English bottoms; or in the ships of that European nation of which the merchandize imported was the genuine growth or manufacture. At the Restoration the former provisions were continued by statute 12 Car. II. c. 18, with this very material addition, that the master and three-fourths of the mariners should also be English subjects.

'It would be an idle and wearisome task to trace the various subsequent Navigation Acts, maintaining, down to a recent period, the same leading feature of exclusive trading, by which, as the titles of the Acts show, it was thought British shipping and navigation were encouraged. The first great step achieved in favour of free trade was effected by the statute 12 & 13 Vict. c. 29, by which the exclusive privileges of

[t] Bl. Com. vol. i. p 419.
[u] Scobell, 132.
[v] Mod. Un. Hist. xli. 289.
[w] Scobell, 176.

British ships were limited in effect to the coasting trade of the United Kingdom, the trade with the Isle of Man and the Channel Islands, and the coasting trade of the British colonies. That Act has, however, been almost entirely repealed by the statute 16 & 17 Vict. c. 107, by which the entire trade is thrown open to vessels of all nations, with very satisfactory results as regards commerce and private enterprise, and probably with no ill effect on the manning of the royal navy. Various Acts exist for the maintenance of discipline among the merchant seamen, and for maintaining their efficiency.[x]'

'While the Navigation and Mercantile Marine Acts of the present period can only operate indirectly in that respect,' many laws have been made, 'having for their immediate object' the supply of the royal navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.

The modes of supplying the navy.

1. First, for their supply. The power of impressing seafaring men for the sea service by the royal commission has been a matter of some dispute, and submitted to with great reluctance; though it has very clearly and learnedly been shown by Sir Michael Foster,[y] that the practice of impressing and granting powers to the admiralty for that purpose is of very ancient date, and has been uniformly continued by a regular series of precedents to the present time: whence he concludes it to be part of the common law,[z] 'and its legality cannot now be doubted.'[a] The difficulty arose from this, that no statute expressly declared this power to be in the Crown, though many of them very strongly implied it. The statute 2 Ric. II. c. 4, speaks of mariners being arrested and retained for the king's service, as of a thing well known and practised without dispute: and provides a remedy against their running away. By a later statute,[b] if any waterman,
[419*] who uses the River Thames, shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By another,[c] no fisherman

[x] 13 & 14 Vict. c. 93; 16 & 17 Vict. c. 131, 17 & 18 Vict. c. 104; 18 & 19 Vict. c. 91.

[y] Rep. 154.

[z] See also Colomb. 245; Barr. 334.

[a] *Rex* v. *Tubbs*, Cowp. 512; Ex p. *Fox*, 5 T. R. 277; 5 & 6 Will. IV. c. 24, ss. 2 & 5.

[b] Stat. 2 & 3 Ph. & M. c. 16.

[c] Stat. 5 Eliz. c. 5.

shall be taken by the Queen's commission to serve as a mariner; but the commission shall be first brought to two justices of the peace inhabiting near the sea-coast where the mariners are to be taken, to the intent that the justices may choose out and return such a number of able-bodied men, as in the commission are contained to serve Her Majesty. By others,[d] especial protections are allowed to seamen in particular circumstances to prevent them from being impressed; 'and lastly, by the statute 5 & 6 Will. IV. c. 24, it is enacted that no person shall be detained against his consent in the naval service for a longer period than five years; that after such service he shall be entitled to a certificate and protection from impressment; and in the event of his continuing to serve, he shall be entitled to a fresh bounty.' Ferrymen are also said to be privileged from being impressed, at common law.[e] All which do most evidently imply a power of impressing to reside somewhere; and, if anywhere, it must, from the spirit of our constitution, as well as from the frequent mention of the king's commission, reside in the Crown alone, 'and accordingly has been so determined.'[f]

But, beside this method of impressing (which is only defensible from public necessity, to which all private considerations must give way), there are other ways that tend to the increase of seamen, and manning the royal navy. 'The voluntary enlistment of seamen is now so effectually encouraged by modern legislation,[g] that during the recent war with Russia the Queen's ships were effectually manned without recourse to the odious system of impressing which was carried on during former wars. Besides which,' parishes may bind out poor boy apprentices to masters of merchantmen.[h] Great advantages in point of wages are given to volunteer seamen, in order to induce them to enter into the naval service;[i] and every foreign seaman who during a war shall serve two years in any man-of-war, merchantman, or privateer, is naturalized *ipso facto*.[j] About the middle of King William's reign a scheme

[d] See stat. 7 & 8 Will. III. c. 21; 2 Ann. c. 6; 4 & 5 Ann. c. 19; 13 Geo. II. c. 17 & c. 28; 2 Geo. III. c. 15; 11 Geo. III. c. 38; 19 Geo. III. c. 75, &c.

[e] Sav. 14.

[f] *Rex* v. *Tubbs*, Cowp. 512.

[g] 5 & 6 Will. IV. c. 24; 16 & 17 Vict. c. 69; 17 & 18 Vict. c. 18.

[h] The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 141-145.

[i] Stat. 31 Geo. II. c. 10.

[j] Stat. 13 Geo. II. c. 3.

was set on foot[k] for a register of seamen to the number of thirty thousand, for a constant and regular supply of the king's [420*] fleet; with great privileges to the registered men, and, on the other hand, heavy penalties in case of their non-appearance when called for. This registry, being judged to be ineffectual as well as oppressive, was abolished by 9 Ann. c. 21; 'but was again revived by the statute 5 & 6 Will. IV. c. 19, by which various provisions were made for forming and maintaining a register of all seamen engaged in the merchant service. This register is now kept under the provisions of the Merchant Shipping Act, 1854.'

The articles of the navy.

2. The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of parliament soon after the Restoration;[l] but since new-modelled and altered, 'by various statutes.'[m] In these articles of the navy almost every possible offence is set down, and the punishment thereof annexed; in which respect the seamen have much the advantage over their brethren in the land-service; whose articles of war are not enacted by parliament, but framed from time to time at the pleasure of the Crown. Yet from whence this distinction arose, and why the executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason: unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which subsisted only from year to year, and might therefore with less danger be subjected to discretionary government. But whatever was apprehended at the first formation of the Mutiny Act, the regular renewal of our standing force at the entrance of every year has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly ingrafted into the British constitution; with this singularly-fortunate circumstance, that any branch of the legislature may annually put an end to its legal existence, by refusing to concur in its continuance.

[k] Stat. 7 & 8 Will. III. c. 21.

[l] Stat. 13 Car. II. st. 1, c. 9.

[m] Stat. 22 Geo. II. c. 33, amended by 19 Geo. III. c. 17, '& 10 & 11 Vict. c. 59.'

'The royal marine forces are subject to the discipline of the navy, while on board ship; but are regulated, while on shore, by an annual Marine Mutiny Act,[n] containing a similar recital, and corresponding provisions to those contained in the annual Act applicable to the army. The time of service in the royal marines is limited by the statute 10 & 11 Vict. c. 63, to twelve years.' Royal Marine forces.

3. With regard to the privileges conferred on sailors, they are pretty much the same with those conferred on soldiers; with regard to relief when maimed, or wounded, or superannuated, either by 'pensions' or the royal hospital at Greenwich;[o] with regard also to the power of making nuncupative testaments: and farther, no seaman on board Her Majesty's ships can be arrested for any debt, unless the same 'were contracted previously to his having entered the service, and' be sworn to amount to at least 'thirty' pounds.[p] Privileges of sailors. [421]

[n] See, for instance, 19 & 20 Vict. c. 8.

[o] '7 & 8 Will. III. c. 21; 10 Geo. IV. c. 26; 4 & 5 Will. IV. c. 34; 8 & 9 Vict. c. 22; 9 & 10 Vict. cc. 9, 10; 10 & 11 Vict. c. 54; 11 & 12 Vict. c. 82; 12 & 13 Vict. c. 28; 13 & 14 Vict. cc. 24, 40.'

[p] '1 Geo. II. st. 2, c. 14, s. 15; 32 Geo. III. c. 33, s. 22; 3 & 4 Will. IV. c 5, s. 3, and c. 6, s. 3.'

CHAPTER XIV.

OF MASTER AND SERVANT, 'AND HEREIN OF PRINCIPAL AND AGENT.'

[422] HAVING thus commented on the rights and duties of persons as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in *private* economical relations.

The three great relations in private life are, 1. That of *master and servant:* which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife;* which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child;* which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated. But, since the parents, on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has therefore provided a fourth relation. 4. That of *guardian and ward;* which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural. Of all these relations in their order.

[423] In discussing the relation of *master and servant,* I shall first consider the several sorts of servants, and how this relation is created and destroyed; secondly, the effect of this relation with regard to the parties themselves; and, lastly, its effects with regard to other persons.

Slavery.

I. As to the several sorts of servants; I have formerly observed that pure and proper slavery does not, nay cannot, subsist in England; such, I mean, whereby an absolute and

unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist anywhere. The three origins of the right of slavery, assigned by Justinian,[a] are all of them built upon false foundations.[b] As, first, slavery is held to arise "*jure gentium,*" from a state of captivity in war; whence slaves are called *mancipia, quasi manu capti.* The conqueror, say the civilians, had a right to the life of his captive, and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that by the law of nature or nations a man may kill his enemy; he has only a right to kill him in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons; much less can it give a right to kill, torture, abuse, plunder, or even to enslave an enemy, when the war is over. Since, therefore, the right of *making* slaves by captivity depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said that slavery may begin "*jure civili;*" when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very just: but when applied to strict slavery, [424] in the sense of which we speak, is also impossible. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life and liberty, both of which (in absolute slavery) are held to be at the master's disposal? His property, also, the very price he seems to receive, devolves *ipso facto* to his master the instant he becomes his slave. In this case, therefore, the buyer gives nothing, and the seller receives nothing; of what validity then can a sale be which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways by which

[a] *Servi aut fiunt aut nascuntur: fiunt jure gentium, aut jure civili; nascuntur ex ancillis nostris.* (Inst. 1, 3, 4.)

[b] Montesq. Sp. L. xv. 2.

slaves "*fiunt*," or are acquired, they may also be hereditary; "*servi nascuntur*;" the children of acquired slaves are *jure naturæ*, by a negative kind of birthright, slaves also. But this, being built on the two former rights, must fall together with them. If neither captivity nor the sale of one's self can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

Upon these principles the law of England abhors, and will not endure the existence of, slavery within this nation; so that when an attempt was made to introduce it by statute 1 Edw. VI. c. 3, which ordained that all idle vagabonds should be made slaves, and be fed upon bread, water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition even in the most abandoned rogues; and therefore this statute was repealed in two years afterwards.[c] And now it is laid down,[d] that a slave or negro, the instant he lands in England, 'or puts his foot on the deck of a British man-of-war,'[e] becomes a freeman; that is, the law will protect him in the enjoyment of his person and his property.

Menial servants. [425]

1. The first sort of servants acknowledged by the laws of England, are *menial servants;* so called from being *intra mœnia*, or domestics. The contract between them and their masters arises upon the hiring. 'In cases of other than menial servants,' if the hiring be general, without any particular time limited, the law construes it to be a hiring for a year;[f] upon a principle of natural equity that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as when there is work to be done, as when there is not:[g] but the contract may be made for any larger or smaller term. 'In the case of menial or domestic servants, the law presumes, in the absence of any special contract, that the parties agreed to continue the relationship

[c] Stat. 3 & 4 Edw. VI. c. 16.

[d] *Smith* v. *Brown*, Salk. 666.

[e] *Somerset's* case, 11 St. Tr. 310; Lofft. Rep. 1.

[f] Co. Litt. 42; *Beeston* v. *Collyer*, 4 Bing. 309; *Fawcett* v. *Cash*, 5 B. & Ad. 904; *Lilley* v. *Elwin*, 11 Q. B. 742.

[g] F. N. B. 168.

of master and servant, until determined by a month's notice, or its equivalent, a month's wages."[h]

'A servant may be dismissed without notice for a reasonable cause, such as moral misconduct;[i] wilful disobedience to a lawful order;[j] or neglect of duty;[k] and in such cases he is not entitled to any wages from the day he is discharged, except those then due.[l] But if wrongfully discharged, he is entitled to wages up to the end of the current period of his service.[m] If, on the other hand, a servant who is to be paid quarterly, or yearly, or at any other fixed time, improperly leaves his service, or is guilty of such misconduct as to justify his discharge during the currency of any such period, he is not entitled to wages for any part thereof,[n] even to the day he quits.'

Servants in husbandry and artificers.

All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are, 'by statute 5 Eliz. c. 4,' compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry: and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning, unless upon reasonable cause to be allowed by a justice of the peace: but they may part by consent, or make [426] a special bargain. 'But this statute, though unrepealed, is practically obsolete.'

Apprentices.

2. Another species of servants are called *apprentices* (from *apprendre*, to learn), and are usually bound for a term of years, by deed indented, or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction: but it may be done to

[h] *Nowlan* v. *Ablett*, 2 Cr. M. & R. 54; *Fewings* v. *Tisdal*, 1 Ex. 295.

[i] Such as *pregnancy* in a female servant (Caldecott, 14); absence on an unfounded pretence (*Crawford* v. *Reid*, 1 Show. Parl. C. 124); pretending to be a partner when only a clerk (*Amor* v. *Fearon*, 9 Ad. & El. 548).

[j] *Spain* v. *Arnott*, 2 Stark. 256; *Turner* v. *Mason*, 14 M. & W. 112.

[k] *Callo* v. *Brouncker*, 4 C. & P. 518.

[l] *Robinson* v. *Hindman*, 3 Esp. 235.

[m] *Gandell* v. *Pontigny*, 4 Camp. N. P. 375.

[n] *Turner* v. *Robinson*, 5 B. & Ad. 789.

husbandmen, nay, to gentlemen, and others. And children[o] of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting: who 'although formerly' compellable to take them, 'are no longer subject to this involuntary engagement;'[p] for which purposes our statutes have made the indentures obligatory, even though such parish apprentice do not execute them. 'Differences between masters and parish apprentices, and other apprentices with whom no premium, or a premium not exceeding 25*l.* has been paid, may be settled by two justices; and on complaint against a master for ill-usage by any such apprentice, the justices may impose a fine on the master, and order all or any part of the premium to be refunded, and may also order the payment of wages not exceeding 10*l.* to apprentices.[q] On the other hand, if an apprentice,' with whom less than 10*l.* has been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction for the same, at any time within seven years after the expiration of his original contract.[r]

Labourers. 3. A third species of servants are *labourers*, who are only hired by the day or the week, and do not live *intra mœnia*, as [427] part of the family; concerning whom the statute 5 Eliz. c. 4, made many regulations: 1. Directing that all persons having no visible effects might be compelled to work: 2. Defining how long they should continue at work in summer and in winter: 3. Punishing such as left or deserted their work: 4. Empowering the justices at sessions, or the sheriff of the county, to settle their wages: and, 5. Inflicting penalties on such as either gave or exacted more wages than were so settled. 'The Act of Elizabeth, however, was in these respects repealed by the statute 53 Geo. III. c. 40, and differences between masters and servants in husbandry, and masters and

[o] Stat. 43 Eliz. c. 2; 7 Jac. I. c. 3; 8 & 9 W. & M. c. 30; 18 Geo. III. c. 47; '20 Geo. III. c. 36; 32 Geo. III. c. 57; 42 Geo. III. c. 46; 51 Geo. III. c. 80; 54 Geo. III. c. 107; 56 Geo. III. c. 139; 1 & 2 Geo. IV. c. 32; 3 & 4 Will. IV. c. 63; 4 & 5 Will. IV. c. 76; 7 & 8 Vict. c. 101; 14 & 15 Vict. c. 11; and as to binding parish apprentices to the sea-service, see the Merchant Shipping Act, 1854.'

[p] 7 & 8 Vict. c. 101, s. 13.

[q] '20 Geo. II. c. 19, s. 3; 32 Geo. III. c. 57, s. 11, *et seq.*; 33 Geo. III. c. 55, s. 1; 4 Geo. IV. cc. 29, 34; 5 & 6 Vict. c. 7.'

[r] Stat. 6 Geo. III. c. 25.

workmen, artificers, miners, colliers, potters, and other labourers, may now be determined by one or more justices of the peace, who may order payment of wages not exceeding 10*l.* to any servant, or 5*l.* to any artificer. Various provisions also exist with respect to breaches of contract by servants of the above description. If they absent themselves from the service before the contract is completed, or do not enter on the service, they may be apprehended and dealt with summarily.'[s]

'Besides the provisions here referred to, there are many others affecting persons who are employed in particular trades, but who cannot be said to form a distinct species of servants from those now under consideration. Thus the employment of children in factories is regulated by the statute 16 & 17 Vict. c. 104; while the Act 5 & 6 Vict. c. 99, which prohibits the employment of women and girls in mines, also regulates the employment of boys in them.'

4. '*Merchant seamen* are, from the increase of commerce and the consequent number of persons employed in this service, entitled to be classed as a distinct species of servants, whose contracts and conduct are in a great measure regulated by recent Acts of Parliament.[t] The provisions as to apprentices to the sea-service have been already referred to.' Seamen.

5. There is yet a fifth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards, factors,* and *bailiffs:* whom however the law considers as 'the agents rather than the servants of their masters or employers. Upon this relation of *principal and agent* are founded all their mutual rights, duties, and liabilities, which it will be more convenient to treat of separately. Let us in the meantime' consider,— Stewards, factors, bailiffs, &c.

II. The manner in which this relation, of service, affects either the master or servant. By apprenticeship under in- II. The incidents of service.

[s] 1 Ann. st. 2, c. 18; 13 Geo. II. c. 8; 20 Geo. II. c. 19; 22 Geo. II. c. 27; 27 Geo. II. c. 6; 31 Geo. II. c. 11; 6 Geo. III. c. 25; 39 & 40 Geo. III. c. 77; 58 Geo. III. c. 51; 4 Geo. IV. c. 34; 10 Geo. IV. c. 52.

[t] See the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), amending and consolidating the previous statutes relating to merchant shipping, as amended by the stat. 18 & 19 Vict. c. 91; see also the 16 & 17 Vict. c. 131.

dentures, a person gains a settlement in that parish wherein he last served forty days.[u] Persons serving seven years as apprentices to any trade formerly had also an exclusive right to exercise that trade in any part of England.[v] This law, with regard to the exclusive part of it, was by turns looked upon as a hard law, or as a beneficial one, according to the prevailing humour of the times: which occasioned a great variety of resolutions in the courts of law concerning it; and frequent attempts for its repeal. At common law every man might use what trade he pleased, but this statute restrained that liberty to such as had served as apprentices: the adversaries to which provision said that all restrictions (which tend to introduce monopolies) were pernicious to trade; the advocates for it alleged that unskilfulness in trades was equally detrimental to the public as monopolies. This reason indeed only
[428] extended to such trades, in the exercise whereof skill was required: but another of their arguments was that apprenticeships are useful to the commonwealth, by employing of youth, and learning them to be early industrious; but that no one would be induced to undergo a seven years' servitude, if others, though equally skilful, were allowed the same advantages without having undergone the same discipline. However, 'the enactment of the statute of Elizabeth on which this monopoly was founded, was repealed by the statute 54 Geo. III. c. 96; and by the Act 5 & 6 Will. IV. c. 76, the exclusive right of trading in boroughs was abolished.'[w]

As to apprentices.

A master may by law correct his apprentice for negligence or other misbehavior, so it be done with moderation:[x] though if the master or master's wife beats any other servant of full age, it is good cause of departure.[y] 'On the other hand it is by the statute 14 Vict. c. 11, a misdemeanor punishable by imprisonment, not exceeding three years, with or without hard

[u] Hiring and service for a year formerly also gained a settlement; but this mode of gaining a settlement has been abolished. (See *ante*, p. 361.)

[v] Stat. 5 Eliz. c. 4. § 31.

[w] This Act does not extend to the city of London, where several customs and bye-laws, excluding other than freemen from trading within the city, still exist.

[x] 1 Hawk. P. C. 130; Lamb. Eiren. 130; *Gylbert* v. *Fletcher*, Cro. Car. 179; *Rex* v. *Duhammel*, 2 Show. 289. 'Formerly,' if any servant, workman, or labourer assaulted his master or dame, he was liable to a year's imprisonment, and other open corporal punishment, not extending to life or limb. 'This statute was, however, repealed by 9 Geo. IV. c. 31.'

[y] F. N. B. 168; Bro. Abr. tit. *Labourers*, 51; *Trespass*, 349.

labour, if a master neglects to provide (when legally liable to do so) his servants or apprentices with necessary food and clothing, or if he assault them so as to endanger life, or permanently injure their health.'

Wages. By service all servants and labourers, except apprentices, become entitled to wages: 'unless, as we have already seen, they have forfeited them by their desertion or misconduct. Besides the enactments already referred to, conferring power on justices of the peace to settle disputes between masters and their servants, workmen and labourers, and to order payment of the wages due by the latter, servants in husbandry, artificers and workmen, may, when their masters are absent, summon and recover wages of the stewards or managers of their employers.[z] None of these enactments giving justices jurisdiction in the case of wages, it may be added, extend to domestic servants, whose claims are left to the ordinary civil tribunals of the country.'

Truck Act. 'By the statute 1 & 2 Will. IV. c. 37, commonly called the "Truck Act," the payment of wages in goods or otherwise than in the current coin of the realm, is prohibited in certain trades, and by the statute 5 & 6 Vict. c. 99, the payment of the wages of persons employed in mines or collieries, at public houses, is prohibited, under a penalty, and wages so paid may be recovered as if not paid. Various statutory provisions have also been made for the decision by arbitration of disputes between masters and workmen.'[a]

'It may be observed that the law, in some respects, places the right to wages very high. Thus in the payment of the debts of a testator or intestate they rank before specialty debts, and by the Bankrupt Laws the wages of clerks or servants of the bankrupt (not exceeding three months' wages or salary, and not exceeding 30*l.*) may be paid in full; the balance of any claim exceeding these amounts being always proveable as a debt under the bankruptcy. The wages of labourers or workmen of the bankrupt, not exceeding 40*s.*, may also be paid in full, and proof made for any balance exceeding that amount.'

'One important incident to the relationship of master and

[z] 4 Geo. IV. c. 34; 10 Geo. IV. c. 52; 6 & 7 Vict. c. 40.

[a] 5 Geo. IV. c. 96; 7 Will. IV. and 1 Vict. c. 67.

servant must also be mentioned. The latter cannot in general recover damages from his master for a mere non-feazance on his part, nor for the negligence of a fellow-servant in the course of his employment; for he is as it were rowing in the same boat with them, and is supposed on entering the service to agree to incur any danger attaching to his position.[b] In order, however, to bring the master within the benefit of this rule of law, if the injury were the act of the fellow-servant, the latter must be a person of ordinary skill and competence for the duties of his situation,[c] although failing in the particular instance, from which the injury to his fellow-servant has arisen.'[d]

III. How third parties are affected.

[429]

III. Let us, lastly, see how strangers may be affected by this relation of master and servant: or how a master may behave towards others on behalf of his servant; and what a servant may do on behalf of his master.

And, first, the master may *maintain*, that is, abet and assist his servant in any action at law against a stranger; whereas, in general, it is an offence against public justice to encourage suits and animosities, by helping to bear the expense of them, and is called in law maintenance.[e] A master also may bring an action against any man for beating or maiming his servant; but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service, and this loss must be proved upon the trial.[f] A master likewise may justify an assault in defence of his servant, and a servant in defence of his master:[g] the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master.[h] Also, if any person do hire or retain my servant, being in my service, for which the servant departeth from me, and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them;[i] but if the new master did not

[b] *Priestley* v. *Fowler*, 3 M. & W. 1.

[c] *Hutcheson* v. *York and Newcastle Railway Company*, 5 Ex. 343.

[d] *Wiggett* v. *Fox*, 11 Ex. 832.

[e] 2 Roll. Abr. 116.

[f] 9 Rep. 113; see also *Hall* v. *Hollander*, 4 B. & C. 660; *Hodsell* v. *Stallebrass*, 11 A. & E. 301.

[g] 2 Roll. Abr. 546; Lofft. 215.

[h] In like manner, by the laws of King Alfred, c. 38, a servant was allowed to fight for his master, a parent for his child, and a husband or father for the chastity of his wife or daughter.

[i] *Lumley* v. *Gye*, 2 El. & Bl. 216.

know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand.[j] The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his retainers, acquired by the contract of hiring, and purchased by giving them wages.[k]

Liabilities of master and servant.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam, qui facit per alium, facit per se.*[l] Therefore, if the servant commit a [430] trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper's servants rob his guests, the master is bound to restitution;[m] for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui non prohibet, cum prohibere possit, jubet.* So likewise, if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master;[n] for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it; if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the

[j] F. N. B. 167, 168.

[k] *Foster* v. *Stewart*, 3 M. & S. 191.

[l] 4 Inst. 109; '*Burgess* v. *Gray*, 1 C. B. 578. On the other hand, a master is not generally responsible for the *wilful* as distinguished from the negligent acts of the servant, when not done by his command, although while in his service.' (*Savignac* v. *Roome*, 6. T. Rep. 125; *Gordon* v. *Rolt*, 4 Ex. 365.)

[m] Noy's Max. c. 43.

[n] 1 Roll. Abr. 95.

principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes upon trust, for here is no implied order to the tradesman to trust my servant; but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority.[o]

[431] If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done while he is actually employed in the master's service, otherwise the servant shall answer for his own misbehavior.[p] Upon this principle by the common law,[q] if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master, because this negligence happened in his service; otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service, and must himself answer the damage personally. But now the common law is, in the former case, altered by statute '14 Geo. III. c. 78,' which ordains that no action shall be maintained against any in whose house, chamber, 'stable, barn, or other building, or on whose estate' any fire shall *accidentally* begin; for their own loss is sufficient punishment for their own or their servant's carelessness. But if such fire happens through negligence of any servant (whose loss is commonly very little), such servant shall forfeit 100*l.* to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse, and there kept to hard labour for eighteen months.[r] A master is, lastly, chargeable if any of his family layeth or casteth

[o] Dr. & Stud. d. 2, c. 42; Noy's Max. c. 44.

[p] *Lyons* v. *Martin*, 8 A. & E. 512.

[q] Noy's Max. c. 44.

[r] Upon a similar principle, by the law of the Twelve Tables at Rome, a person by whose negligence any fire began was bound to pay double to the sufferers; or, if he was not able to pay, was to suffer a corporal punishment.

anything out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people,[s] for the master hath the superintendence and charge of all his household. And this also agrees with the civil law,[t] which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi.*" [432]

We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in a servant, but never can be a gainer; he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same—that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

Principal and agent.

'I have reserved for separate consideration the relation of *principal and agent*, for though a servant may often be the agent of his master or employer, the agent of another is by no means necessarily his servant; and the rights, duties, and liabilities of the agent are founded upon principles somewhat different from those which have been pointed out as governing the relation of master and servant.'

'An *agent*, within which denomination are included *bailiffs, factors, brokers*, &c., is a person authorised to do some act or acts in the name of another, who is called his *principal;* and whatever a man has power to do in his own right, he may (except in a few peculiar cases) appoint another to do for him. But one who is the agent of another cannot appoint or substitute an under-agent, *vicarius non habet vicarium*,[u] unless where the employment is such as it is not within his own unaided power to fulfil, and his employer could not have expected him to perform it alone. In such a case, if he obtain the assistance of others, he does nothing more than what his principal intended him to do, the maxim of the law being "*in contractis tacite insunt quæ sunt moris et consuetudinis.*"'

'In mercantile affairs agents are usually commissioned by a letter, but a verbal order is sufficient; and the mere fact of

[s] Noy's Max. c. 44. [t] Ff. 9, 3, 1; Inst. 4, 5, 1. [u] Roll. Abr. 330.

one person's being employed to do any business whatever for another, creates between them this relation. In some cases it is required that the authority shall be *in writing*, or even by deed.[v] Thus the appointment of an agent to make a lease required by the Statute of Frauds to be in writing, must by the same statute be made in writing,[w] and it is a strict rule of law that an agent who is to execute a deed, or take or give livery of seisin, must be appointed by deed.'[x]

'The agent's authority (unless it be coupled with an interest, such as a power of attorney granted as security for a debt) may, in general, be revoked at any time. It ceases of course upon the death or bankruptcy of the principal.'

Of factors and brokers.

'Of mercantile agents two extensive classes exist, *factors* and *brokers*, between whom this distinction is made,[y] that the *factor* is intrusted not only with the disposal of property, but with the possession of the very property itself, while the *broker* is merely employed to make contracts, without having anything to do with the custody or transmission of the goods which are the subject of the bargain.[z] Brokers in London are required by statute 6 Ann. c. 16, and 57 Geo. III. c. 60, to be admitted to the performance of their functions by the mayor and aldermen, and must take an oath and enter into a bond for the due observance of the regulations made by the corporation. Without being duly qualified under the Acts, a London broker cannot recover compensation for business done.'[a]

'Thus much for the general nature of agency, from which it will be obvious that in every transaction in which an agent is employed there must be at least three parties concerned, whose relative positions and mutual rights may become matter of question, viz., the principal, the agent, and the party with whom the bargain is made or business transacted,—which will lead us to consider: 1. The mutual rights and duties of the agent and his principal; 2. Those of the principal and third parties; and 3. Those of the agent and third parties.'

'1. The rights which the principal has against his agent, or,

[v] Bac. Abr. *Authority*, A.

[w] 29 Car II. c. 3, s. 1.

[x] *Harrison* v. *Jackson*, 7 T. R. 207; 2 Roll. Abr. R. pp. 3, 4.

[y] *Baring* v. *Corrie*, 3 B. & Ald. 137.

[z] See, as to the definition of a *broker*, *Mitford* v. *Hughes*, 16 W. & M. 174. An *auctioneer* is not a broker (*Wilks* v. *Ellis*, 2 H. Bl. 555); neither is a merchant acting on commissions from abroad. (*Janson* v. *Green*, 4 Burr. 2103.)

[a] *Cope* v. *Rowlands*, 2 M. & W. 157.

in other words, the duties which the agent owes to his principal, depend upon the instructions contained, either expressly or impliedly, in his appointment. These it is the duty of the agent to carry into effect, if possible, to the letter,[b] unless his obedience would involve a fraud upon third persons; for no contract which a man can make obliges him to be a party to a fraud.[c] If however the principal subsequently recognizes the agent's departure from the letter of his instructions, the latter is exonerated, for *omnis ratihibitio retrotrahitur et mandato æquiparatur*.'[d]

Duties of an agent.

'The appointment of the agent is his authority; and it may either be *general*, to act in all the principal's affairs, or *special*, concerning some particular object. It may also be *limited* by instructions as to the conduct he is to pursue, or *unlimited*, his conduct being left to his own discretion. The agent is in all cases bound to exercise his best powers and skill to execute the task confided to him, and he ought not to accept the agency, unless he possesses a competent degree of skill. For it is part of the contract implied by law from his acceptance of the employment, that he is competent to perform the duties intrusted to him; and therefore he is answerable to the principal for all damage occasioned by his negligence or unskilfulness; a responsibility which applies not only to the immediate consequences of his negligence or want of skill, but to all such losses as would not otherwise have occurred. If the agent exceed his authority, and a loss accrue, he is responsible for the loss;[e] but if a benefit result, he must account for it to his employer.'[f]

'In a person standing in the position of an agent, the *strictest good faith* is also required. An agent employed to sell is not allowed to be himself the purchaser; neither can an agent employed to buy be himself the seller, unless there was a plain understanding to that effect between him and his principal; and if an agent, who is employed to purchase, purchases for himself, he will be considered a *trustee* for his principal.'[g]

'An agent is not in general accountable for money until he has actually received it, unless he has, by improper credit or

[b] *Barron* v. *Fitzgerald*, 6 Bing. N. C. 201; *Guerreiro* v. *Peile*, 3 B. & Ald. 616.

[c] *Bexwell* v. *Chester*; Comp. 395.

[d] *Prince* v. *Clark*, 1 B. & C. 186.

[e] *Cattlin* v. *Bell*, 4 Camp. 183.

[f] *Russell* v. *Palmer*, 2 Wils. 325.

[g] Smith's Merc. Law, 5th ed. p. 124.

Del credere commission.

neglect, occasioned a delay of payment. But an agent acting under a commission *del credere*, that is, one who has undertaken to be surety to his principal for the solvency of the persons he deals with, is, on their default, accountable for the debt. In all cases where an agent has received money on behalf of his principal, he is bound to take care of it according to the general rules which regulate his conduct; and if any loss arise by the fraud or failure of third persons, he will, unless his conduct be warranted by his instructions, or the usage of trade, be bound to make it good.[h] If a stranger, for instance, calls upon him by a written authority to transfer the money in his hands, and the authority is a forgery, he is accountable for all that is transferred under it.'[i]

Rights of agents.

'The chief right of the agent as against his principal is to receive his remuneration, commonly called his *commission*, the amount of which is fixed either by express contract or by the usage of trade, and in some cases by Act of Parliament.[j] But this right may be forfeited in several ways, as if the employment itself be illegal, the agent can then establish no claim; or it may be lost by misconduct, negligence, or want of skill, whereby the employer is prevented from deriving benefit from his services, or still more, by bad faith, or wilfully acting in a manner adverse to his principal's intent.[k] Besides commission, the agent has a right to charge certain advances made by him in the *regular course of trade;* for to make such is, by implication, a part of his employment.'[l]

Liability of the principal.

2. 'The agent has a right to bind his principal as far as his authority extends. When the authority is *express*, there can seldom be any doubt as to its extent, but when it is not so, but has to be inferred from the conduct of the principal, difficulty may arise; and the rule laid down for solving questions of this kind is, "*that the extent of the agent's authority is* (*as between his principal and third parties*) *to be measured by the*

[h] *Wren* v. *Kurton*, 11 Ves. 382.

[i] ——— v. *Jolland*, 8 Ves. 72.

[j] The stat. 12 Ann. st. 2, c. 16, limits brokerage for procuring loans of money to 5*s*. per 100*l*. By 10 Ann. c. 19, s. 121, the brokerage on buying and selling exchequer-bills, bank-bills, joint-stock, &c., is limited to 2*s*. 9*d*. per cent. The 17 Geo. III. c. 26, s. 7, gives a solicitor 10*s*. per cent. for procuring a loan on annuity; and by 31 Geo. II. c. 10, a navy agent's commission is fixed at 6*d*. in the pound.

[k] Smith's Merc. Law, 5th ed. p. 132.

[l] *Sutton* v. *Tatham*, 10 A. & E. 27.

extent of his usual employment." "If," says Lord Chief Justice Holt,[m] "a man send his servant with ready money to buy "goods, and the servant buy upon credit, the master is not "chargeable. But if the servant *usually* buy for the master "upon tick, and the servant buy some things without the "master's order, yet if the master were trusted by the trader, "he is liable." And this rule admits of being followed out into a thousand cases and varieties. It applies to cases respecting bills and notes, which, if drawn, indorsed, or accepted by a clerk who has been previously allowed to do so, bind the master, though the money never came to his use: it is applied to sales and guarantees, and indeed to every species of mercantile transaction.'[n]

'As the employment is the measure of the authority to be inferred, there can be no inference of authority if there has been no previous employment; in such a case, a party who trusts the agent does so at his peril, since the principal will only be liable for what has come to his use.[o] On the same reasoning, an employment in one kind of occupation affords no inference of authority to act in another. An authority to receive money in the course of business implies no authority to receive it in collateral transactions, or out of the ordinary course of business.'[p]

'In executing a deed, an agent may either sign the name of his principal,[q] or state it to be due by himself as agent for his principal;[r] or by his principal through him, the agent.[s] But if he sign his own name without mentioning his principal, the latter will not be bound.[t] And an agent employed to draw, indorse, or accept negotiable instruments, must not do so in his own name, otherwise he will make himself liable to the holder.'[u]

'At common law a factor employed to sell goods had not the power of pledging the goods intrusted to him;[v] but this rule having been found inconvenient in mercantile business, it was altered by the statute 4 Geo. IV. c. 83, an act which was afterwards amended by statute 6 Geo. IV. c. 99, usually called Factor's Act.

[m] Shower, 95.

[n] Smith's Merc. Law, 5th ed. p. 136.

[o] 1 Ld. Raym. 225; *Kilgour* v. *Finlayson*, 1 H. Bl. 155.

[p] *Saunderson* v. *Bell*, 2 C. & M. 304; *Kaye* v. *Brett*, 5 Ex. 269.

[q] 9 Co. 76, 77.

[r] 9 Co. 77.

[s] *Wilks* v. *Buch*, 2 East, 142.

[t] 9 Co. 76, 77.

[u] *Leadbitter* v. *Farrow*, 5 M. & Sel. 345.

[v] *Patteson* v. *Tash*, 2 Str. 1178.

"The Factors' Act;" and subsequently by the statute 5 & 6 Vict. c. 39. Into the various enactments of these statutes it would be improper to enter with any detail in these elementary commentaries. Their general effect may be stated to be, that any agent intrusted with the possession of goods, or of the documents of title thereto, is deemed to be the owner of such goods or documents, so far as to give validity to any contract by way of pledge, lien, or security made concerning the same. The effect of the statutes is also to validate the pledging of goods by a person who is known to have received them as an agent for the purpose of sale, unless there be an absolute prohibition by the owner against pledging, and the existence of such prohibition is known to the person who lends the money.'[w]

'Payment to the agent, in the course of his employment, is payment to the principal, but it must be in the course of his employment,[x] for otherwise he has no authority to receive the money. Therefore if a man comes to pay a mortgage debt to a merchant at his counting-house, and pays it to a clerk, or if an executor pays a legacy left to a tradesman to a shopman in his shop, in neither case would there be a good payment to the master. Payment to an agent, in order to be good, must also be specifically appropriated to the debt due to the principal, not made upon a general account. Thus if a creditor employ an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving the debt, writes off money due from himself to the debtor, the latter is not discharged. As payment to an agent is payment to the principal, so delivery to the former is a delivery to the latter: the general maxim on which the whole law of principal and agent hinges being *qui facit per alium facit per se.*[y]

'The principal is not only bound to third parties by the contracts entered into with them by his agent, he is also, to some extent, liable for *wrongs* committed by the agent while engaged in his service. This will always be the case where the *wrong* has been done in express fulfilment of his order;[z]

[w] *Navulshaw* v. *Brownrigg*, 1 Sim. (N. S.) 873; 2 De G. Mac. & G. 441.

[x] *Sykes* v. *Giles*, 5 M. & W. 645; *Williamson* v. *Candlish*, 5 Ex. 91.

[y] Smith's Merc. Law, 5th ed. pp. 154, 155.

[z] *Gregory* v. *Piper*, 9 B. & C. 591.

but it may also happen even in the absence of any express command. Thus he is responsible for his agent's negligence, while acting in the prosecution of his business, as we have already seen to be the case when the relation of master and servant exists; and this responsibility may in some cases extend to the negligence of sub-agents. Thus, where A. employed B. to repair his house, and B. contracted with C. to do the work, and C. with D. to furnish the materials, which D.'s servant carelessly left on the road, and thereby caused injury to the plaintiff, it was held that A. was answerable for the mischief.'[a]

'As the principal is bound by the acts and contracts of his authorized agent, so he may take advantage of them; and if one person contract, even without authority, in the name of another, that other, though he may repudiate the contract, may also, if he think fit, adopt and enforce it.'[b]

'But the principal's right to enforce contracts made by his agent is subject to this restriction, that if the agent has been allowed to deal in his own name, then the other party will have the same rights against the principal as he would have had against the agent, had he been the principal. Thus a purchaser from a factor, who sells and delivers goods *in his own name*, may, in an action brought by the principal for the value of the goods, set off any claim which he, the purchaser, may have against the factor.[c] This rule is founded on considerations of fairness, for the purchaser might have been influenced in entering into the contract, by the consciousness of having a set-off, without which he might not have been willing to deal at all.'

3. 'A factor or other agent, who has made a contract, in the subject-matter of which he has a special property, may maintain an action thereon in his own name, and that whether he professed to contract for himself or not.[d] Thus an auctioneer may sue for the price of goods sold by him on the owner's premises, and known to be his property.[e] He may do this as a trustee for his principal, but in some cases he may do it for his own benefit, as when he has a lien[f] for his balance upon the price of the goods sold by him.'

[a] *Bush* v. *Steinman*, 1 B. & P. 404.
[b] *Roulte* v. *Thompson*, 13 East, 274.
[c] *Warner* v. *M'Kay*, 1 M. & W. 591.
[d] 4 Atk. 248.
[e] *Williams* v. *Millington*, 1 H. Bl. 81.
[f] See as to *liens*, vol. ii. p. 465.

'On the other hand, an agent, contracting as such for a known and responsible employer, incurs no personal liability to third parties.[g] If he with whom he contracted knew him to be an agent, knew his principal, and knew that he intended to bind that principal, he will be taken to have trusted to the credit of that principal, and the agent will not be bound. To this rule there is an exception in the case of masters of ships, who are responsible as well as the owners on contracts for repairs, stores, or sums of money for those purposes, unless indeed it appear that the lender, in fact, trusted the owner alone.[h] If an agent exceed his authority, his principal will not be bound, but he himself will be liable, although he may be innocent of fraudulent intention.[i] And although there must be special circumstances to render an agent liable on contracts made for his employer, yet it is otherwise if he commits *torts* in his master's service. In such a case the principal may often be liable, but the agent will always be so.'[j]

'The misconduct of an agent, besides the civil responsibility which it imposes on him, amounts in some cases to a misdemeanor, and subjects the offender to a very severe punishment: what these offences are will be explained in the fourth volume of these Commentaries.'[k]

[g] *Ex parte Hurtop*, 12 Ves. 352.

[h] *Hoskins* v. *Slayton*, Cases temp. Hardw. 376.

[i] *Polhill* v. *Walter*, 3 B. & Ad. 114.

[j] 12 Mod. 488.

[k] See *post*, vol. iv. p. 263.

CHAPTER XV.

OF HUSBAND AND WIFE.

THE second private relation of persons is that of *marriage*, which includes the reciprocal rights and duties of husband and wife; or, as most of our elder law-books call them, of *baron* and *feme*. In the consideration of which I shall, in the first instance, inquire how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequences of marriage. [433]

I. How marriages may be contracted.

I. Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law; the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment, therefore, of incestuous or other unscriptural marriages, is the province of the spiritual courts, which act *pro salute animæ*.[a] And, taking it in a civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

First, they must be *willing* to contract. "*Consensus non concubitus faciat nuptias*," is the maxim of the civil law in this case;[b] and it is adopted by the common lawyers,[c] who indeed have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws. [434]

Secondly, they must be *able* to contract. In general all persons are able to contract themselves in marriage, unless

[a] Salk. 121. [b] Ff. 50, 17. 30. [c] Co. Litt. 33.

they labour under some particular disabilities and incapacities. What these are, it will be here our business to inquire.

Canonical disabilities.

Now these *disabilities* are of two sorts: first, such as are canonical, and secondly, such as are civil. The former are sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation by blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences deducible from thence: it therefore being considered sinful in the persons who labour under them to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, *pro salute animarum*. But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties.[d] And therefore when a man had married his first wife's sister, and after her [435] death the bishop's court was proceeding to annul the marriage and bastardize the issue, the Court of King's Bench granted a prohibition *quoad hoc*, but permitted them to proceed to punish the husband for incest.[e] These canonical disabilities being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes which serve as directories to those courts, of which it will be proper to take notice.

By the statute 32 Hen. VIII. c. 38, it is declared that all persons may lawfully marry but such as are prohibited by God's law; and that all marriages contracted by lawful persons in the face of the church, and consummated with bodily knowledge and fruit of children, shall be indissoluble. And (because, in the times of popery, a great variety of degrees of

[d] Co. Litt. 33.

[e] 2 Salk. 548.

kindred were made impediments to marriage, which impediments might however be bought off for money) it is declared by the same statute, that nothing (God's law excepted) shall impeach any marriage, but within the Levitical degrees; the farthest of which is that between uncle and niece.[f] By the same statute all impediments arising from *pre-contracts* to other persons were abolished and declared of none effect, unless they had been consummated with bodily knowledge: in which case the canon law holds such contract to be a marriage *de facto.* This branch of the statute was repealed by the statute 2 & 3 Edw. VI. c. 23. But the Act of 26 Geo. II. c. 33,[g] again prohibited all suits in the ecclesiastical courts to compel a marriage in consequence of any contract, 'whether *per verba de præsenti,* or *per verba de futuro:* and a similar provision being re-enacted in the existing statute 4 Geo. IV. c. 76, the impediment of pre-contract may be considered entirely abolished.'

Pre-contract.

'The Act of Henry VIII. left marriages *within the Levitical degrees* in precisely the same position as they were before the statute. They were voidable in the ecclesiastical courts, but not void until sentence of nullity had been obtained. In this position all such marriages remained until the statute 5 & 6 Will. IV. c. 64, entirely altered the law with respect to them.'

Consanguinity and affinity.

'After reciting that "marriages between persons within the "prohibited degrees are voidable only by sentence of the "ecclesiastical court pronounced during the lifetime of both "the parties, and that it is unreasonable that the state and "condition of the children of marriages between persons within "the prohibited degrees of *affinity* should remain unsettled "during so long a period, and that it is fitting that all mar-"riages which may thereafter be celebrated between persons "within the prohibited degrees of *consanguinity* or *affinity* "should be *ipso facto* void, and not merely voidable;" the statute proceeds to enact, that all marriages previously celebrated between persons within the prohibited degrees of

[f] Gilb. Rep. 158. 'The prohibited marriages are those between parties related to each other, either by consanguinity or affinity, within the third degree inclusive.' (Gibs. Cod. 413.)

[g] 'This statute was passed to put a stop to the disgraceful practices which then prevailed at the Fleet, May-fair, and elsewhere, by which boys and girls were forced or entrapped into contracts of marriage *per verba de præsenti,* in the presence of a person in holy orders. These contracts, when consummated by *copula,* were valid marriages.'

affinity shall not thereafter be annulled, for that cause, by any sentence of the ecclesiastical court. The statute after providing that this enactment shall not affect marriages between persons being within the prohibited degrees of *consanguinity*, next enacts, that all marriages thereafter celebrated between persons within the prohibited degrees of *consanguinity* or *affinity*, shall be absolutely null and void to all intents and purposes whatsoever. This statute has given rise to a great deal of discussion in and out of Parliament, and to repeated efforts to obtain its repeal, in consequence of its avoiding marriages between a man and his deceased wife's sister.'[h]

'Marriages are still voidable in the ecclesiastical courts in consequence of corporal infirmities, or an inability at the time of the marriage to procreate children.[i]

Civil disabilities. The other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And though some of them may be grounded on natural law, yet they are regarded by the laws of the land not so much in the light of any moral offence as on account of the civil inconveniences they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable; not that they [436] dissolve a contract already formed, but they render the parties incapable of performing any contract at all; they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union.

1. Prior marriage. 1. The first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void:[j] polygamy being condemned both by the law of the New Testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express,[k] that "*duas uxores eodem tempore habere non licet.*"

[h] *Reg.* v. *Chadwick*, 11 Q. B. 173.

[i] *Bury's* case, 5 Rep. 98; 2 Leon. 169.

[j] Bro. Abr. tit. *Bastardy*, pl. 8.

[k] Inst. 1, 10, 6.

2. The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting: *à fortiori*, therefore, it ought to avoid this, the most important contract of any. Therefore, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law.[l] But the canon law pays a greater regard to the constitution than the age of the parties;[m] for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in our law it is so far a marriage that, if at the age of consent they agree to continue together, they need not be married again. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she may; for in contracts the obligation must be mutual; both must be bound, or neither: and so it is, *vice versâ*, when the wife is of years of discretion, and the husband under.[n] **2. Want of age.**

3. Another incapacity arises from want of consent of parents or guardians. By the common law, if the parties themselves were of age to consent, there wanted no other concurrence to make the marriage valid; and this was agreeable to the canon law. But by several statutes,[o] penalties were laid on every clergyman who married a couple either without publication of banns (which may give notice to parents or guardians), or without a licence, to obtain which the consent of parents or guardians must be sworn to. And by the statute 4 & 5 P. & M. c. 8, whosoever married any woman child under the age of sixteen years, without consent of parents or guardians, were subjected to fine, or five years' imprisonment; and her estate during the husband's life went to and was enjoyed by the next heir. The civil law indeed required the consent of the parent or tutor at all ages, unless the children were emancipated, or out of the parent's power;[p] **3. Want of consent of parents.** [437]

[l] Leon. Constit. 109.
[m] Decretal. l. 4, tit. 2, qu. 3.
[n] Co. Litt. 79.
[o] 6 & 7 Wm. III. c. 6; 7 & 8 Wm. III. c. 35; 10 Ann. c. 19.
[p] Ff. 23, 2, 2, & 18.

and if such consent from the father was wanting, the marriage was null, and the children illegitimate,[q] but the consent of the mother or guardians, if unreasonably withheld, might be redressed and supplied by the judge, or the president of the province:[r] and if the father was *non compos*, a similar remedy was given.[s] These provisions are 'partially' adopted and imitated by the French, and also in Holland 'and Belgium;' and it having been thought proper to introduce somewhat of the same policy into our laws, the statute 26 Geo. II. c. 33, enacted, that all marriages celebrated by licence (for banns suppose notice) where either of the parties was under twenty-
[438] one (not being a widow or widower, who are supposed emancipated), without the consent of the father, or, if he be not living, of the mother or guardians, should be absolutely void. A like provision was made, as in the civil law, where the mother or guardians was *non compos*, beyond sea, or unreasonably froward, to dispense with such consent at the discretion of the lord chancellor: but no provision was made in case the father should labour under any mental or other incapacity.

Much may be, and much has been said, both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes, and thereby destroying one end of society and government, which is *concubitu prohibere vago.* And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbade marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints; for if a parent did not provide a husband for his daughter by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account, "*quia non sua culpa, sed parentum, id commisisse cognoscitur.*"[t]

[q] Ff. 1, 5, 11.
[r] Cod. 5, 4, 1, & 20.
[s] Inst. 1, 10, 1.
[t] Nov. 115, § 11.

'Whatever may have been or may be said for or against the propriety or necessity of the restraints upon marriage first imposed by the statute of George II., it is still the policy of our law to prevent such unions, when the parties are, or one of the parties is, under age, unless with the permission of the parent or guardian.[u] The consent thus required, in the case of the marriage of any person under twenty-one (not being a widower or widow, for where there has been a previous marriage, the child is deemed to have been emancipated from parental control),[v] is that of the father; or if the father be dead, of the guardian, lawfully appointed; or if there be no guardian, then of the mother (if unmarried); or if there be no mother unmarried, then of any guardian appointed by the Court of Chancery. If the father of the minor be *non compos mentis*,[w] or if the guardian or mother be *non compos mentis*, or in parts beyond the seas, or unreasonably, or from undue motives withholds consent to a proper marriage, application may be made, by petition, to the Court of Chancery, which may give an effectual consent. But the marriage of a minor without the requisite consent is, nevertheless, valid;[x] the provisions of the statute 4 Geo. IV. c. 76, in this respect being only *directory*. Where, however, such a marriage is solemnized by means of the false oath or fraudulent procurement of one of the parties, the party so offending is liable to forfeit all the property which would otherwise accrue from the marriage.'

4. A fourth incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract, be valid.[y] It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to anything. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment; though **4. Want of reason.**

[u] See the Marriage Act, 4 Geo. IV. c. 76, and 6 & 7 Will. IV. c. 85, s. 10.

[v] The *patria potestas* of the civil law was abolished by the canon law. (*Sherwood* v. *Ray*, 1 Moore P. C. C. 353.)

[w] Exp. *J. C.* 3 My. & Cr 471.

[x] *Rex* v. *Birmingham*, 8 B. & C. 29; *Lane* v. *Goodwin*, 4 Q. B. 361.

[y] 1 Roll. Abr. 357.

[439] not a cause of divorce, if they happened after marriage.[z] And modern resolutions have adhered to the reason of the civil law, by determining[a] that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, upon this account (concurring with some private family[b] reasons) the statute 15 Geo. II. c. 30, has provided that the marriage of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any Act of Parliament), before they are declared of sound mind by the lord chancellor, or the majority of such trustees, shall be totally void.

5. Parties must contract according to form of law.

Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made, *per verba de præsenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to contract, was before the 'statute of George II. so far' a valid marriage, 'that' the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiæ*. But these verbal contracts are now of no force to compel a future marriage;[c] 'their only operation being to give the party who is willing to perform his promise a right of civil action against the one who refuses to do so.'[d]

'Until the law was altered by the statute 6 & 7 Will. IV. c. 35, no' marriage was valid that was not celebrated in some parish church or public chapel, unless by dispensation from the Archbishop of Canterbury. It must also have been preceded by publication of banns, or by licence from the spiritual judge. Many other formalities were likewise prescribed; the neglect of which, though penal, did not invalidate the marriage; but it was held to be essential to a marriage, that it should be performed by a person in orders,[e] though the intervention of a priest to solemnize this contract is merely

[z] Ff. 23, tit. 1, l. 8, & tit. 2, l. 16.

[a] Morrison's case *coram delegat.*

[b] See private Acts 23 Geo. II. c. 6.

[c] 26 Geo. II. c. 33; '4 Geo. IV. c. 76.'

[d] *Wild* v. *Harris*, 7 C. B. 999.

[e] Salk. 119; '*Reg.* v. *Millis*, 10 Cl. & Fin. 534; *Catherwood* v. *Caslon*, 13 M. & W. 261.'

juris positivi, and not *juris naturalis aut divini*: it being said that Pope Innocent III. was the first who ordained the celebration of marirage in the church;[f] before which it was totally a civil contract.[g] [440]

'The above-mentioned statute was passed for the relief of those who scrupled at joining in the services of the Established Church; and was the result of a long and arduous struggle, carried on for many years in and out of parliament. It provides for places of religious worship other than the churches and chapels of the Establishment, being registered for the solemnization of marriages therein;[h] and it also enables persons who wish to do so to enter into this contract without any religious ceremony whatever. It is therefore no longer essential to the validity of a marriage, either that it should be solemnized in a parish church or public chapel, or be performed by a person in holy orders; but whether celebrated *in facie ecclesiæ*, or (under the provisions of the above-mentioned statute), in a place of religious worship, or in the presence merely of the superintendent registrar of births, deaths, and marriages, the officer before whom civil marriages may be performed, the contract must be preceded and accompanied by certain circumstances of publicity, or entered into in virtue of a licence obtainable only on proof by affidavit that there is no legal impediment to the marriage.'

How marriage may be celebrated.

'Marriages, then, may be celebrated either with the solemnities prescribed by the statute 4 Geo. IV. c. 76, commonly called the Marriage Act; or in a place of religious worship; or in the presence of the superintendent registrar; these latter modes of proceeding being resorted to generally by those who dissent from the doctrines, or object to joining in the services of the Established Church.'

'With reference to marriages celebrated *in facie ecclesiæ*, the statute 4 Geo. IV. c. 76, directs that the rules contained in the office for the solemnization of matrimony, in the Book

[f] Moor. 170.

[g] In the times of the grand rebellion, all marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by statute 12 Car. II. c. 33.

[h] 'As to the registration of Protestant places of worship, see 1 W. & M. sess. 1, c. 18, & 52 Geo. III. c. 155; of Roman Catholic chapels, 31 Geo. III. c. 32, and 2 & 3 Will. IV. c. 115; and of Jewish synagogues, 9 & 10 Vict. c. 59. As to registration now by the registrar-general, see 15 & 16 Vict. c. 36, and 18 & 19 Vict. c. 81.'

of Common Prayer, shall be observed,[i] and that banns shall be published in conformity with the canons of the church, or otherwise that a licence shall be obtained from some ecclesiastical authority to marry without banns. The common licence is obtained from the ordinary of the place or his surrogate (one obtained from the Archbishop of Canterbury is called a special licence), and cannot be granted to marry in any church or chapel, unless one of the parties has had his or her usual place of abode in the parish to which it belongs for fifteen days immediately preceding; and all ministers are forbidden to solemnize marriage more than three months after complete publication of the banns or grant of the licence. The marriage must also be in a church or chapel wherein banns may be lawfully published;[j] and it must take place between eight and twelve in the forenoon (except in the case of special licence) and be solemnized by a person in holy orders.'

Marriage *in facie ecclesiæ*.

'If the marriage be by banns, and either party be under twenty-one (not being a widower or widow), the publication is made void by the open declaration of dissent by the parent or guardian of the minor. No licence, on the other hand, can be granted, unless upon the oath of one of the parties, that he or she believes that no lawful impediment exists to the marriage, and that one of the parties has for fifteen days immediately preceding had his or her usual place of abode within the parish or chapelry where the marriage is to be solemnized. If one of the parties be under twenty-one (and not a widower or widow), it must further be sworn either that the consent of the person whose consent is required by law has been obtained, or that there is no one having authority to give consent. If the parties knowingly and *wilfully*[k] intermarry in any other place than a church or chapel wherein banns may be lawfully published (except by special licence); or knowingly and wilfully intermarry without due publication of banns[l] or licence from the proper authority; or knowingly and wilfully acquiesce in the solemnization of marriage by a person not in holy orders, the marriage is null and void to all purposes.'

[i] *Harrod* v. *Harrod*, 1 Kay & J. 4.

[j] District and other churches and chapels may be licensed for this purpose. See also 7 Will. IV. and 1 Vict. c. 22, ss 33, 34, and 7 & 8 Vict. c. 56, s. 1.

[k] Error without fraud does not invalidate the marriage. (14 & 15 Vict. c 97, s. 25.)

[l] *Mealy* v. *Reed*, 2 Curt. 833.

'It is also an offence, amounting to felony, to solemnize marriage except between the stated hours of eight and twelve, unless by *special* licence; or to solemnize it without due publication of banns, unless by licence; or to solemnize it according to the ceremonies of the church, under a false pretence of being in holy orders. But a minister's solemnizing a marriage after publication of banns, between persons, one of whom is under twenty-one, to which union the consent of the parents or guardians has not been obtained, is not punishable even by ecclesiastical censure, unless he had notice of the dissent of the parent or guardian, as the case may be.'

'Quakers and Jews[m] were expressly excepted from the operation of the Marriage Act, and may now have their unions celebrated according to their own usages, upon obtaining the superintendent registrar's certificate, in the manner about to be explained.'

Marriages of dissenters.

'The other modes of celebrating a marriage are those provided by the statute 6 & 7 Will. IV. c. 85.[n] Under the statute 6 Geo. IV. c. 76, giving, as we have seen, legal effect to the requirements of the law ecclesiastical, a marriage may be solemnized either by virtue of a *special licence* from the Archbishop of Canterbury, or by a *common licence* from the ordinary or a surrogate, or after due publication of *banns*. Two other modes have now been provided, one by *licence*, the other by *certificate* from the superintendent registrar of births, deaths, and marriages;[o] the former resembles the common licence

[m] As to Jewish marriages and divorces, see *Moss* v. *Smith*, 1 M. & G. 232; 10 & 11 Vict. c. 58.

[n] As amended by 7 Will. IV. and 1 Vict. c. 22; and 3 & 4 Vict. c. 72.

[o] The office of superintendent registrar was created by the statute 6 & 7 Will. IV. c. 86, which was passed for the purpose of forming a complete register of births, deaths, and marriages in England. For this purpose the Poor Law Unions were divided into districts, for which registrars were appointed; these registrars, with the superintendent registrar in each Union (generally the clerk to the Board of Guardians) having the care of all the registers therein For the complete registration of *births* and *deaths*, the father and mother of every child, or the occupier of every house in which any birth or death happens, is required, under a penalty, to furnish information of the fact to the registrar (within forty-two days in the case of births, and within five days in the case of deaths), who enters particulars of such births or deaths in books furnished to him for that purpose by the registrar-general (15 & 16 Vict. c. 25). In the case of deaths, some person present or in attendance during the illness of the deceased, or the occupier or an inmate of the house, furnishes the particulars required by the registrar, and no body can be buried, nor any funeral or religious service be performed, without the production of the

given by the ordinary, the latter the certificate obtainable on the due publication of banns in the parish church. The latter mode may also be adopted when the marriage is intended to be solemnized in a church, the superintendent registrar's certificate having the same legal effect as the publication of banns.'[p]

Notice of marriage.

'When a marriage is in contemplation, and the parties intend to proceed under the statute 6 & 7 Will. IV. c. 85, notice is to be given to the superintendent registrar of the district within which each party has resided for not less than *seven* days. This notice must, by the statute 19 & 20 Vict. c. 119, be accompanied by a solemn declaration that there is no lawful impediment to the marriage, including a declaration, when either of the parties is under twenty-one and is not a widower or widow, either that the required consent has been given, or that there is no person who has authority to give such consent; it is then entered in the "Marriage Notice Book," which is open, without fee, at all reasonable times to persons desirous of inspecting it; it is suspended in the office of the superintendent registrar, and is to be read by the clerk to the guardians of the poor of the district *three* times in *three* successive weeks—a proceeding corresponding to the publication of banns in the parish church. If a licence is obtained before the first of these readings, the notice need not be read at all; if obtained in the course of the three weeks, the reading of the notice may be discontinued,[q] just as the publication of banns is unnecessary when or after the ordinary's licence has been obtained.'

'If the marriage is to be by the superintendent registrar's *licence*, the party who gave the notice must next obtain a certificate thereof from the superintendent registrar, which he may do after *seven* days from the entry of the notice in the "Notice Book." If, on the other hand, the marriage is to be

registrar's certificate. Certified copies of the entries of births and deaths are sent quarterly by the registrar to the superintendent registrar, and by him to the registrar-general; the register-book itself, when filled, being transmitted to, and kept by, the superintendent registrar. In like manner, copies of the entries of marriages from their respective register-books are transmitted by the clergymen of the Established Church, and by the proper officers of Quakers' meeting-houses and Jewish synagogues, and by the registrars who register marriages in other places of religious worship, to the registrar-general; one of the duplicate register-books of marriages remaining in the church or other building.

p 7 Will. IV. & 1 Vict. c. 22, s. 36.

q 6 & 7 Will. IV. c. 85, s. 6; 7 Will. IV.; and 1 Vict. c. 22, s. 24.

by certificate, the party can only obtain this after the lapse of the twenty-one days, during which, as we have seen, the notice of marriage is suspended in the office of the superintendent registrar; because in the meantime, and before the certificate is issued, any person may prevent its being granted by writing "*forbidden*" opposite the entry in the "Marriage Notice Book," and subscribing thereto his or her name and place of abode, stating, at the same time, the character, whether as parent or guardian, in which he or she is authorized to interfere. The notice and all proceedings thereon, when the issue of the certificate is forbidden, becomes utterly void in the same way as the publication of banns is nullified by their being forbidden. The entering of frivolous *caveats* to licences and certificates is restrained by making the person who forbids the issue of the certificate liable to costs and damages, in an action by the party against whose marriage any such caveat may be entered.'

'When the certificate has been obtained, after the lapse of the twenty-one days, the marriage may be at once solemnized either according to the rites of the church (without any publication of banns), or according to the ceremonies of the Jews or Quakers, if *both* parties be of either of the latter persuasions. Persons not desirous of adopting any of these ceremonials may be married according to any form they please, in any building specified in the notice of marriage, and which has been certified as a place of religious worship, and registered for the solemnization of marriages. The ceremony must take place in the presence of some registrar of the district (a distinct officer from the superintendent registrar of births, deaths, and marriages) and two or more credible witnesses; it must be solemnized with open doors, and between the hours of eight and twelve in the forenoon; and the parties must in some part of the ceremony declare that they know of no lawful impediment to their marriage, and call upon the persons present to witness that they take each other for husband and wife. Those who do not wish or who object to be married in a registered place of worship may, if they please, enter into this contract at the office of the superintendent registrar, in the presence of that official and of some registrar of the district and two witnesses, the doors being open, and the contract being accompanied by the same declaration, and

By certificate.

made between the same hours of eight and twelve, as in the case of marriages in a church or a place of religious worship.'[r]

By licence.

'If the parties intend to be married by the *licence* of the superintendent registrar, then after the lapse of seven days from the time of giving notice this licence may be obtained, on one of the parties making oath that he or she believes that no lawful impediment exists, and that he or she has resided for fifteen days immediately preceding in the district where the marriage is to be solemnized. If either of the parties be under age, and not a widower or widow, it must further appear either that the proper consent has been obtained, or that there is no person having authority to give such consent; under this licence the parties may be married either in a place of worship other than a church, or in the office of the superintendent registrar; or, if the parties are Jews or Quakers, according to their own usages. The superintendent registrar, it will be observed, has no authority to grant a *licence* for marriage in any church or chapel of the Church of England, the primate and the ordinary alone possessing this privilege.'

'As in the case of marriages *in facie ecclesiæ*, under a licence from the ordinary, marriages under the statute 6 & 7 Will. IV. c. 85, whether by certificate or licence, must be celebrated within *three months* from the entry of the notice. After that period the notice and all the proceedings thereon are void. A compliance with the provisions of this statute, in the cases to which it applies, is also enforced by making a disregard of its enactments more or less penal, as in the case of marriages under the statute 6 Geo. IV. c. 76. Thus if any persons knowingly and wilfully intermarry in any other place than that specified in the notice and certificate, or without due notice to the superintendent registrar; or without certificate duly issued, or licence where it is required; or in the absence of the registrar or superintendent registrar (where the presence of either is required by law), the marriage is null and void. Procuring a marriage to be celebrated by means of a wilfully false notice, or certificate, or declaration, also exposes the

[r] 'The statute 19 & 20 Vict. c. 119, allows persons contracting a complete marriage before the registrar to have the ceremonies of their church or persuasion added in a church or chapel. The object of this is to satisfy any subsequent religious scruples raised by or suggested to the parties'

offender to the forfeiture of all the property, which may accrue by virtue of the marriage; and any person knowingly and wilfully celebrating a marriage in any other place than the registered building or office specified in the notice or certificate (except in the case of Quakers and Jews), or solemnizing it before or after the expiration of the different periods of time fixed by the statute for the issuing or the duration of the certificate or licence, or in the absence of the registrar when the ceremony takes place in a registered building or in a superintendent registrar's office, is guilty of felony.'

'Finally, all marriages must be registered in one or other of the modes prescribed by the statute 6 & 7 Will. IV. c. 86. For this purpose duplicate register-books are supplied by the registrar-general to the clergy of the Established Church, and to the proper officers at Quakers' meeting-houses and Jewish synagogues, one of which is preserved at the church or other building, and the other transmitted, when filled, to the registrar-general. At marriages in places of worship duly registered for that purpose, a registrar attends expressly to register the marriage. Marriages at the offices of the superintendent-registrars are registered in a book provided for the purpose.' **Registration of marriages.**

'It may be added here, that marriages contracted in Scotland or Ireland, or elsewhere abroad, are valid by the law of England, if valid by the laws of the country where such marriages take place;[s] that marriages solemnized by a person in holy orders in the house of a British ambassador or resident minister, or in the chapel of a British factory, or *within the lines* of a British army abroad, are equally valid as if solemnized at home;[t] and that by the statute 12 & 13 Vict. c. 68, marriages celebrated by British consuls in foreign countries are equally valid as if solemnized in England, provided the forms required by that statute are duly observed.' **Marriages contracted abroad.**

We may upon the whole collect, *first,* that no marriage by the temporal law is *ipso facto void;* that is, celebrated 'in either of the above ways between single persons not within the prohibited degrees of consanguinity or affinity, and of

[s] *Dalrymple's* case, reported by Dodson, London, 1811; *Doe* d. *Birtwhistle* v. *Vardill*, 5 B. & C. 438, 6 Bing. N. C. 385; *Dalhousie* v. *M'Douall*, 7 Cl. & Fin. 817; *Kent* v. *Burgess*, 11 Sim. 361.

[t] 4 Geo. IV. c. 91; *Waldegrave Peerage*, 4 Cl. & Fin. 649.

sound mind, although one or both be under age. *Secondly*, no marriage is *voidable* by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediment of corporal imbecility, subsisting previous to the marriage. 'But *thirdly*, marriages within the prohibited degrees of consanguinity or affinity are absolutely null and void.'

II. How marriages may be dissolved.

II. I am next to consider the manner in which marriages may be dissolved; and this is either by death or divorce.[u] There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensâ et thoro.*

By divorce a vinculo matrimonii.

The total divorce, *a vinculo matrimonii*, must be for the canonical impediment before mentioned, existing *before* the marriage, not supervenient, or arising *afterwards*. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*; and the parties are therefore separated *pro salute animarum*. The issue of such marriage as is thus entirely dissolved are bastards.[v]

By divorce a mensâ et thoro.

[441]

Divorce *a mensâ et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving it; but for some supervenient cause it becomes improper or impossible for the parties to live together; as in case of intolerable ill-temper,[w] 'cruelty,'[x] or adultery in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause why a man may put away his wife and marry another.[y] The civil law, which is partly of pagan origin, allows many causes of absolute divorce; and some of them pretty severe ones (as if a wife goes to the theatre or the public games, without the knowledge and consent of the husband);[z] but among them adultery is the principal, and

[u] The whole law on this subject is to be found in the First Report laid before Parliament, in 1853, of the Commissioners appointed in 1850 to inquire into the Law of Divorce.

[v] Co. Litt. 235.

[w] *Evans* v. *Evans*, 1 Hagg. 36.

[x] *Saunders* v. *Saunders*, 1 Rob. Ec. Rep. 549; *Paterson* v. *Paterson*, 3 H. L. Ca. 308.

[y] Matt. xix. 9.

[z] Nov. 117.

with reason named the first.[a] But with us in England adultery is only a cause of separation from bed and board;[b] for which the best reason that can be given is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties,[c] which is now prohibited by the canons.[d]

Divorces *a vinculo matrimonii*, for adultery, are generally granted to the husband by Act of Parliament, 'after a sentence of divorce *a mensâ et thoro* in the ecclesiastical court,[e] provided his conduct has been free from reproach,[f] and he has recovered damages against the adulterer in an action at law; although this latter requirement may be dispensed with.[g] But divorces *a vinculo* cannot be obtained at the suit of the wife,[h] except in cases of aggravated enormity, such for instance as incestuous intercourse with her relations, which preclude the possibility of future reconciliation.'[i] Divorce *a vinculo*.

In cases of divorce *a mensâ et thoro*, the law allows alimony to the wife; which is that allowance which is made to a woman for her support out of the husband's estate; being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case.[j] This is sometimes called her *estovers;* for which, if he refuses payment, there is (besides the ordinary process of excommunication) an action at common law *de estoveriis habendis*, in order to recover it.[k] It is generally proportioned to the rank and quality of the parties. But in cases of elopement and living with an adulterer, the law allows her no alimony.[l] Of alimony. [442]

[a] Cod. 5, 17, 8.

[b] Moor. 683; '*Folzamb's* case, in the Star Chamber, 3 Salk. 138.'

[c] 2 Mod. 314.

[d] Can. 1603, c. 105.

[e] Lords' Standing Orders, 171.

[f] *Simmons'* Divorce Bill, 12 Cl. & Fin. 339.

[g] *Lardner's* divorce, 6 Cl. & Fin. 569. To prevent collusion, the petitioner is required to attend on the second reading of a divorce Bill, to be examined at the bar if this be deemed desirable; but this attendance may be dispensed with. (*Heneage's* Divorce Bill, 1 H. L. Ca. 496.)

[h] *Mrs. Teush's* case, Macqueen's Pr. of H. of Lords, 602; *Mrs. Moffat's* case, ibid. 658.

[i] *Mrs. Addison's* case, Macqueen, 594; *Mrs. Turton's* case, ibid. 659; *Mrs. Battersby's* case, ibid. 667.

[j] See the Commissioners' Report on the Law of Divorce, p. 2.

[k] 1 Lev. 6.

[l] Cowel. tit. *Alimony*.

III. Legal consequences of marriage in general.

III. Having thus shown how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

Husband and wife but one person.

By marriage, the husband and wife are one person in law;[m] that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-French a *feme-covert, fœmina viro cooperta;* is said to be *covert-baron,* or under the protection and influence of her husband, her *baron,* or lord; and her condition during her marriage is called her *coverture.* Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal.* For this reason, a man cannot grant anything to his wife, or enter into a covenant with her, for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant with himself; and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.[n] A woman indeed may be attorney for her husband;[o] for that implies no separation from, but is rather a representation of her lord. And a husband may also bequeath anything to his wife by will; for that cannot take effect till the coverture is determined by his death.[p] The husband is bound to provide his wife with necessaries[q] by law, as much as himself; and if she contracts debts for them, he is obliged to pay them,[r] 'unless he supplies her with necessaries himself;'[s] but for anything besides necessaries, he is not chargeable, 'unless the wife had authority express or implied to contract for him.'[t] Also if a wife elopes,[u]

Liability of husband for contracts of wife.

[443] 'or' lives with another man, the husband is not chargeable even for necessaries;[v] 'and' if the person who furnishes 'the

[m] Co. Litt. 112.
[n] Cro, Car. 551.
[o] F. N. B. 27.
[p] Co. Litt. 112.
[q] *Montague* v. *Benedict,* 3 B. & C. 631; 2 Smith's L. C. 374.
[r] Salk. 118.
[s] *Seaton* v. *Benedict,* 5 Bing. 28; *Renaux* v. *Teakle,* 8 Ex. 680.
[t] *Manby* v. *Scott,* 1 Sid. 120; 2 Smith's L. C. 341 *et notis; Reid* v. *Teikle,* 13 C. B. 627.
[u] *Child* v. *Hardyman,* 2 Stra. 875.
[v] Stra. 647, 706.

wife with goods,' is sufficiently apprized 'that she has no authority to pledge her husband's credit, he is not responsible.' [w] If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together.[x] If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own;[y] neither can she be sued, without making the husband a defendant.[z] There is indeed one case where the wife shall sue and be sued as a *feme sole*, viz. where the husband has abjured the realm, or is banished,[a] for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately;[b] for the union is only a civil union; 'and although a husband and wife may now be witnesses for and against each other in most civil actions, they are not' allowed to give evidence for or against each other 'in criminal cases;' [c] partly because it is impossible their testimony should be indifferent; but principally because of the union of person; and therefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo propriâ causâ testis esse debet;*" and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare.*" But where the offence is directly against the person of the wife, this rule does not apply:[d] and therefore, by 'the repealed statute' 3 Hen. VII. c. 2, 'it was expressly provided that' in case a woman were forcibly taken away, and married, she 'might' be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract; and also there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if by forcibly marrying a woman he [444]

Of suits at law, by or against husband and wife.

As to their evidence for or against each other.

[w] *Etherington* v. *Parrott*, Salk. 118.

[x] 3 Mod. 186.

[y] Salk. 119; 1 Roll. Abr. 347.

[z] Bro. Error, 173; 1 Leon. 312; 1 Sid. 120. This was also the practice in the courts at Athens. (Pot. Antiq. b. 1, c. 21.)

[a] Co. Litt. 133. This rule does not apply when he is an alien enemy. (*De Wahl* v. *Braune*, 1 Hurlst. & Nor. 178.)

[b] 1 Hawk. P. C. 3.

[c] See *post*, vol. iv. p. 420.

[d] See *post*, vol. iv. p. 420.

could prevent her from being a witness, who is perhaps the only witness to that very fact.

In the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries:[e] and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband. 'So also in our courts of equity, a married woman may, by her next friend, sue and be sued in respect of contracts relating to her separate estate.'

When not considered as one person.

But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done by her during her coverture, are void,[f] except it be a fine, or the like matter of record, 'or a deed acknowledged as directed by the statute 3 & 4 Will. IV. c. 74, abolishing fines and recoveries,' in which case she must be solely and secretly examined, to learn if her act be voluntary.[g] She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion.[h] And in some felonies and other inferior crimes, committed by her through constraint of her husband, the law excuses her;[i] but this extends not to treason or murder.

Right of husband to correct his wife.

The husband also (by the old law) might give his wife moderate correction.[k] For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds,[l] and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causâ regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet.*[m] The civil law gave the husband the same, or a larger authority over his wife; allowing him for some

[e] Cod. 4, 12, 1.

[f] *Marshall* v. *Rutter*, 8 T R. 545.

[g] Litt. § 669, 670; see *post*, vol. ii. p. 368.

[h] Co. Litt. 112.

[i] 1 Hawk. P. C. 2.

'*Reg* v. *Manning*, 2 Car. & K. 887, in which case effect was given to the 7 & 8 Vict. c. 66, s. 16, enacting that an alien woman married to a British subject shall be *de facto* naturalized.'

[k] 1 Hawk. P. C. 130.

[l] Moor. 874.

[m] F. N. B. 80.

misdemeanors, *flagellis et fustibus acriter verberare uxorem;* [445]
for others, only *modicam castigationem adhibere.*[n] But with us, in the politer reign of Charles II., this power of correction began to be doubted;[o] and a wife may now have security of the peace against her husband;[p] or, in return, a husband against his wife.[q] Yet the lower rank of people, who were always fond of the old common law, still claim, and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.[r]

These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.[s]

[n] Nov. 117, c. 14; Van Leeuwen *in loc.*

[o] 1 Sid. 113; 3 Keb. 433.

[p] 2 Lev. 128.

[q] Stra. 1207.

[r] '*Cochrane's* case, 6 Dowl. P. C. 630.'

[s] 'With the exception of the protection afforded to the separate property of a wife by the Courts of Equity, it is difficult to find any substantial grounds upon which to support this conclusion; for the protection from liability conferred upon women in their married state is in effect quite as beneficial to their husbands and children as to themselves.'

'In other respects, the law always favoured, and in many respects still favours, the husband. Thus, a widow's estate in *dower* is only one-third that of a widower in *curtesy;* and until recently, the custody of the persons of infants was given exclusively to the father, the mother not being at liberty even to see them without her husband's permission; a defect partially remedied by the statute 2 & 3 Vict. c. 54. The law of divorce is universally admitted to be most unjust in its operation as regards the wife. When convicted of a crime, a woman, whether married or single, was denied the *benefit of clergy;* and, till 3 & 4 Wm. & M. c. 9, might have been executed for the first offence in simple larceny and other crimes, while a male, who could read, was punished only with burning in the hand and a few months' imprisonment. So a woman, guilty of the murder of her husband, might, until 30 Geo. III. c. 48, be punished by being burnt alive; while, if a husband murdered his wife, the crime was in law no greater than if he had murdered a mere stranger.'

'It is difficult, however, to concur in the argument of Mr. Christian, that women, at least spinsters, have reason to complain of injustice in that they are not allowed to vote for members of parliament, for they might as well complain of being excluded from the jury lists or the commission of the peace. If their liability to taxation be urged as the reason for their admission to the franchise, upon the maxim that taxation and representation should be inseparable, it may be said with equal force that they ought to be ballotted for the militia and liable to answer the sheriff's summons for the *posse comitatus*, upon the maxim that protection and allegiance are inseparable. Sound arguments may be urged in support of most, if not all, of the still-subsisting distinctions between the legal positions of the sexes, but there seems "little reason to pay a compliment to our laws for their respect and favour to the female sex."'

CHAPTER XVI.

OF PARENT AND CHILD.

[446] THE next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child.

Children are of two sorts; legitimate and spurious, or bastards; each of which we shall consider in their order; and, first, of legitimate children.

I. Legitimate children.

I. A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. "*Pater est quem nuptiæ demonstrant*," is the rule of the civil law;[a] and this holds with the civilians, whether the nuptials happen before, or after the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth,[b] of which more will be said when we come to consider the case of bastardy. At present let us inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

1st, Duties of parents.

1. And, first, the duties of parents to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education.

The duty of maintaining children.

The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation, says Puffendorf,[c] laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might after-

[a] Ff. 2, 4, 5.

[b] And so strict is this rule, that where a person, born a bastard, becomes, by the subsequent marriage of his parents, legitimate according to the laws of the country in which he was born, he is still a bastard, so far as regards the inheritance of lands in England. (*Doe* d. *Birdwhistle* v. *Vardill*, 6 Bing. N.C. 358.)

[c] L. of N. l. 4, c. 11.

wards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents. And the president Montesquieu[d] has a very just observation upon this head: that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children: for that ascertains and makes known the person who is bound to fulfil this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way;—shame, remorse, the constraint of her sex, and the rigour of laws;—that stifle her inclinations to perform this duty; and besides, she generally wants ability.

The municipal laws of all well-regulated states have taken care to enforce this duty: though Providence has done it more effectually than any laws, by implanting in the breast of every parent that natural *στοργη*, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children can totally suppress or extinguish.

The civil law[e] obliges the parent to provide maintenance for his child: and, if he refuses, "*judex de eâ re cognoscet.*" Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, without expressly giving his reason for so doing; and there are fourteen such reasons reckoned up,[f] which may justify such disinherison. If the parent alleged no reason, or a bad, or a false one, the child might set the will aside, *tanquam testamentum inofficiosum*, [448]
a testament contrary to the natural duty of the parent. And it is remarkable under what colour the children were to move for relief in such a case; by suggesting that the parent had lost the use of his reason when he made the *inofficious* testament. And this, as Puffendorf observes,[g] was not to bring into dispute the testator's power of disinheriting his own offspring; but to examine the motives upon which he did it: and, if they were found defective in reason, then to set them

[d] Sp. L. b. 23, c. 2.
[e] Ff. 25, 3, 5.
[f] Nov. 115.
[g] L. 4, c. 11, § 7.

aside. But perhaps this is going rather too far; every man has, or ought to have, by the laws of society, a power over his own property: and, as Grotius very well distinguishes,[h] natural right obliges to give a *necessary* maintenance to children; but what is more than that they have no other right to, than as it is given them by the favour of their parents, or the positive constitutions of the municipal law.

How enforced by law.

Let us next see what provision our own laws have made for this natural duty. It is a principle of law,[i] that there is an obligation on every man to provide for those descended from his loins; and the manner in which this obligation shall be performed, is pointed out 'by the statutes 43 Eliz. c. 2, and 5 Geo. I. c. 8.' The father and mother, grandfather and grandmother of poor impotent persons, shall maintain them at their own charges, if of sufficient ability, according as the quarter sessions shall direct:[j] and if a parent runs away, and leaves his children, the churchwardens and overseers of the parish 'may obtain an order of justices to' seize his rents, goods, and chattels, and dispose of them toward their relief.[k] By the interpretations which the courts of law have made upon these statutes, if a mother or grandmother married again, and was before such second marriage of sufficient ability to keep the child, the husband was charged to maintain it:[l] on the ground that, being a debt of hers when single, it should like others extend to charge the husband. 'But it was afterwards determined, that the obligation imposed by the statutes applied only to relations by blood, and consequently that the husband was not responsible for the maintenance of the children of his wife.[m] Now, however, by the statute 4 & 5 Will. IV. c. 76, commonly called the Poor Law Amendment Act, a husband is liable to maintain his wife's children born before marriage, whether legitimate or illegitimate, until they reach the age of sixteen, or until the death of the mother; for' at her death, the relation being dissolved, the husband is under no further obligation.

[449] No person is bound to provide a maintenance for his issue,

[h] De J. B. et P. l. 2, c. 7, n. 3.

[i] Raym, 500.

[j] This order may be made by two justices in petty sessions, there being an appeal to the quarter sessions. (59 Geo. III. c. 12, s. 26.)

[k] *Stubb* v. *Dixon*, 6 East, 166.

[l] Styles, 283; 2 Bulstr. 346.

[m] *Tubb* v. *Harrison*, 4 T. R. 118; *Cooper* v. *Martin*, 4 East, 76.

unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20s. a-month.[n] For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent against his will to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours.[o]

Our law has made no provision to prevent the disinheriting of children by will: leaving every man's property in his own disposal, upon a principle of liberty in this, as well as every other action; though perhaps it had not been amiss, if the [450]
parent had been bound to leave them at the least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs also, and children, are favourites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir.[p]

The duty of protecting children.

From the duty of maintenance we may easily pass to that of *protection*, which is also a natural duty, but rather permitted

n *Winston* v. *Newcomen*, 6 A. & El. 301; *Seaborne* v. *Maddy*, 7 C. & P. 497.

o As nothing is so apt to stifle the calls of nature as religious bigotry, it was enacted by the stat. 11 & 12 Will. III. c. 4, that if any Popish parent should refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor should, by order of court, constrain him to do what was just and reasonable. But this did not extend to persons of another religion, of no less bitterness and bigotry than the popish; and, therefore, in the very next year we find an instance of a Jew of immense riches, whose only daughter having embraced Christianity, he turned her out of doors; and on her application for relief, it was held she was entitled to none (Lord Raym. 699). But this gave occasion (Com. Jour. 18 Feb.; 12 Mar. 1701) to another statute (1 Ann. st. 1, c. 30), which ordained that if Jewish parents refused to allow their Protestant children a fitting maintenance suitable to the fortune of the parent, the lord chancellor, on complaint, should make such order therein as he should see proper. 'Both statutes were repealed by 9 & 10 Vict. c. 59.'

p 1 Lev. 130.

than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their lawsuits without being guilty of the legal crime of maintaining quarrels;[q] 'and he' may also justify an assault and battery in defence of their persons.[r]

The duty of educating children.

The last duty of parents to their children is that of giving them an *education* suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes,[s] it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he
[451] afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences, which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation, by the statutes 'which have been already referred to, for the education of and' for the apprenticing poor children,[t] who are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth; 'and although no national system of education has yet been devised,[u] for many years past large annual grants have been

[q] 2 Inst. 564.

[r] 1 Hawk. P. C. 131. 'Sir William Blackstone adds here that,' where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards unfortunately died, it was not held to be murder, but manslaughter merely (Cro. Jac. 296; 1 Hawk. P. C. 83); such indulgence does the law show, 'continues the commentator,' to the frailty of human nature, and the workings of parental affection. 'But it would appear, from Mr. Justice Foster's comment on the case, that "the ground of the decision was "the absence of any fact denoting malice, rather than indulgence shown "to parental passion." (Coleridge, Blackst.')

[s] L. of N. b. 6, c 2, § 12.

[t] See *ante*, pp. 360, 363.

[u] See *ante*, p. 226.

made by parliament for the purpose of promoting the education of the children of the poor, the money thus placed at the disposal of the government being distributed by the committee of privy council for education.' The rich are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family.[v]

2. The *power* of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away.[w] But the rigour of these laws was softened by subsequent constitutions; so that [x] we find a father banished by the Emperor Hadrian for killing his son, though he had committed a very heinous crime, upon this maxim, that "*patria potestas in pietate debet, non in atrocitate, consistere.*" But still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his [452]

2. Power of parents over their children.

[v] In one case, that of religion, they were formerly under peculiar restrictions; for, by stat. 1 Jac. I. c. 4, and 3 Jac. I. c. 5, it was provided that, if any person sent any child under his government beyond the seas, either to prevent its good education in England, or in order to enter into or reside in any popish college, or to be instructed, persuaded, or strengthened in the popish religion; in such case, besides the disabilities incurred by the child so sent, the parent or person sending forfeited 100*l.*, which went to the sole use and benefit of him that discovered the offence (11 & 12 Will. III. c. 4). And by stat. 3 Car. I. c. 2, if any parent or other sent or conveyed any person beyond sea, to enter into, or be resident in, or trained up in any priory, abbey, nunnery, popish university, college, or school, or house of jesuits, or priests, or in any private popish family, in order to be instructed, persuaded, or confirmed in the popish religion, or contributed anything towards their maintenance when abroad by any pretext whatever, the person both sending and sent were disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and forfeited all his goods and chattels, and likewise all his real estate for life. 'These disabilities no longer exist. (31 Geo. III. c. 32; 10 Geo. IV. c. 7; 2 & 3 Will. IV. c. 115.')

[w] Ff. 28, 2, 11; Cod. 8, 47, 10.

[x] Ff. 48, 9, 5.

acquisitions belonged to the father, or at least the profits of them for his life.[y]

The power of a parent by our English laws is much more moderate, but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner;[z] for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age was also *directed* by our ancient law to be obtained: 'and is still required, although the observance of such consent does not of itself render the marriage invalid.'[a] And this also is another means, which the
[453] law has put into the parent's hands, in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons: and next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his son's *estate*, than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. He may indeed have the benefit of his children's labour while they live with him, and are maintained by him; but this is no more than he is entitled to from his apprentices or servants. The legal power of a father over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established), when the empire of the father, or other guardian, gives place to the empire of reason. Yet till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

'During the father's life, the' mother, as such, is entitled to no power, but only to reverence 'and respect, and until recently

[y] Inst. 2, 9, 1. [z] 1 Hawk. P. C. 130. [a] See *ante*, p. 457.

might even be excluded by the father from all access to her children.[b] Now, however, by the statute 2 & 3 Vict. c. 54, commonly called Talfourd's Act, an order may be made on petition to the Court of Chancery, giving mothers access to their children; and if such children are within the age of *seven* years, for delivery of them to their mother, until they attain that age. No mother, however, against whom adultery has been established is entitled to the benefit of the Act.'

'A mother, by the father's death, becomes entitled to the custody of her children until they are of age; and where no other guardian has been appointed stands (if unmarried) in the father's place, as to the consent required to the marriage of the child during its minority.[c] But she cannot appoint a guardian by will, not being within the statute 12 Car. II. c. 24.'[d]

'In this empire over the child the law in some cases affords to the parent a peculiar protection. Thus by the statute 9 Geo. IV. c. 31, forcibly or fraudulently to take or entice away or detain any child under the age of ten years, with intent to deprive a parent or other person having lawful care or charge of it, of the possession of such child, or knowingly to harbour any child so taken or enticed away, is a felony now punishable by penal servitude or imprisonment.[e] The same statute makes it a misdemeanor punishable by fine or imprisonment, or both, unlawfully to take any unmarried girl under the age of sixteen out of the possession and against the will of her father or mother, or of any other person having charge of her. And by the statute 12 & 13 Vict. c. 76, the fraudulently procuring a girl under twenty-one to have illicit carnal connexion with any one is a misdemeanor punishable with two years' imprisonment.'

3. The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after: **3. Duties of children.**

[b] *Rex* v. *Greenhill*, 4 A. & E. 628.
[c] See *ante*, p. 457.
[d] See *ante*, p. 457.
[e] 16 & 17 Vict. c. 99.

they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. And the Athenian laws[f] carried this principle into practice with a scrupulous kind of nicety; obliging all children to provide for their father, when fallen into poverty; with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in any way of gaining a
[454] livelihood. The legislature, says Baron Montesquieu,[g] considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious; that in the second case, he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation; and that in the third case he had rendered their life (so far as in him lay) an insupportable burthen, by furnishing them with no means of subsistence.

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehaviour of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the cause or suit of a bad parent as a good one; and is equally compellable,[h] if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shown the greatest tenderness and parental piety.

II. Illegitimate children.

II. We are next to consider the case of illegitimate children, or bastards; with regard to whom let us inquire, 1. Who are bastards? 2. The legal duties of the parents towards a bastard child? 3. The rights and incapacities attending such bastard children?

1. Who are bastards?

1. Who are bastards? A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matri-

[f] Potter's Antiq. b. 4, c. 15.

[g] Sp. L. b. 26, c. 5.

[h] Stat, 43 Eliz. c. 4; '4 & 5 Will. IV. c. 76, ss. 56, 78.'

mony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry:[i] and herein they differ most materially from our law; which, though not so strict as to require that the child shall be *begotten*, yet makes it an indispensable condition, to make it legitimate, that it shall be *born* after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage taken in a civil light; abstractedly from any religious view, which has nothing to do [455] with the legitimacy or illegitimacy of the children. The main end and design of marriage, therefore, being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong: this end is undoubtedly better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues; 1. Because of the very great uncertainty there will generally be in the proof that the issue was generally begotten by the same man; whereas by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain what child is legitimate, and who is to take care of the child. 2. Because by the Roman law a child may be continued a bastard, or made legitimate, at the option of the father and mother by a marriage *ex post facto;* thereby opening a door to many frauds and partialities which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate by the subsequent marriage of his parents;[j] whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman law admits of no limitations as to the time or number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state; to which one main inducement is usually not only the desire of having *children,* but also the

[i] Inst. 1, 10, 13; Decret. 4, 17, 1.

[j] See a curious case of *legitimatio per subsequens matrimonium* in *Kerr* v. *Martin.* (1 Macqueen's Appeal Cases, 650).

desire of procreating lawful *heirs*. Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence, by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, though not begotten in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten,
[456] as well as born within the rules of honour and civil society. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children before marriage should be esteemed legitimate.[k]

From what has been said, it appears that all children born before matrimony are bastards by law: and so it is of all children born so long after the death of the husband, that by the usual course of gestation they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days.[l] And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate: an attempt which the rigour of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death.[m] In this case with us the heir presumptive, 'or a contingent devisee,'[n] may have a writ *de ventre inspiciendo*, to examine whether she be with child or not;[o] and, if she be, to keep her under proper restraint till delivered; which is entirely conformable to the practice of the civil law:[p] but if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within forty weeks from the death of a

[k] *Rogaverunt omnes episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quia ecclesia ta'es habet pro legitimis. Et omnes comites et barones unâ voce responderunt quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.* (Stat. 20 Hen. III. c. 9; see the introduction to the Great Charter, edit. Oxon, 1759, *sub anno* 1253.)

[l] Cro. Jac. 541.

[m] Stiernhook, *de Jure Goth.* l. 3, c. 5.

[n] Co. Litt. by Harg. 8 b. n. 3; 123 b. n. 1; exp. *Wallop*, 4 Bro. C. C. 90; *Aiscough's* case, 2 P. Wms. 591.

[o] Co. Litt. 8; Bract. l. 2, c. 32.

[p] Ff. 25, tit. 4, *per tot.*

husband.[q] But if a man dies, and his widow soon after marries again, and a child is born within such a time as that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases.[r] To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus*,[s] a rule which obtained so early as the reign of Augustus,[t] if not of Romulus; and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments.[u] [457]

As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria*), for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards.[v] But, generally during the coverture, access of the husband shall be presumed, unless the contrary can be shown;[w] which is such a negative as can only be proved by showing him to be elsewhere: for the general rule is *præsumitur pro legitimatione.*[x] In a divorce *a mensâ et thoro*, if the wife breeds children they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved: but in a voluntary separation by agreement, the law will suppose access, unless the negative be shown.[y] So also if there is an apparent impossibility of procreation on the part of the husband, as if he be eight years old, or the like, there the issue of the wife shall be bastards.[z] Likewise in case of

[q] Britton, c. 66.

[r] Co. Litt. 8. 'Brooke questions this doctrine; see Hargrave's note.'

[s] Cod. 5, 9, 2.

[t] But the year was then only *ten* months. (Ovid. Fast. 1 27.)

[u] 'Let every widow continue husbandless a twelvemonth.' LL. Ethelr. A.D. 1008; LL. Canut. c. 74. 1 Thorpe, 323, 417.

[v] Co. Litt. 244.

[w] Salk. 123; 3 P. Wms. 276; Stra. 925.

[x] 5 Rep. 98; '*Morris* v. *Davis*, 5 Cl. & Fin. 163; *Reg.* v. *Mansfield*, 1 Q. B. Rep. 444; *Hargrave* v. *Hargrave*, 9 Beav. 552; see also the *Gardner Peerage* case, reported by Le Marchant; the *Banbury Peerage* case, Sir Harris Nicolas on Adulterine Bastardy.'

[y] Salk. 123.

[z] Co. Litt. 244.

divorce in the spiritual court *a vinculo matrimonii*, all the issue born during the coverture are bastards;[a] because such divorce is always upon some cause that rendered the marriage unlawful and null from the beginning.

2. Duties of the parents to bastards.

2. Let us next see the duty of parents to their bastard children by our law, which is principally that of maintenance. For, though bastards are not looked upon as children to any [458] civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved; and they hold indeed as to many other intentions, as, particularly, that a man shall not marry his bastard sister or daughter.[b] The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances,[c] was neither consonant to nature nor reason; however profligate and wicked the parents might justly be esteemed.

The method by which the English law provides maintenance for them is (now, after many changes,) as follows: 'The woman may, either when pregnant or within a year after the birth of an illegitimate child (or at any time thereafter, upon proof that the putative father has, within twelve months, paid money for the maintenance of the child), obtain a summons for the alleged father to appear at petty sessions; and on his appearance, or proof of the service of such summons, and on hearing the evidence of the mother, corroborated in some material particular, the justices may make an order on such putative father for the payment of a weekly sum not exceeding five shillings for the first six weeks after birth, and two shillings and sixpence afterwards, until the child attains the age of thirteen, or until the marriage of the mother, or death of the child. In case of neglect to make payment, the amount and costs may be levied by distress on the father's effects, and he may be detained in custody until the result of the distress be known; and if it prove insufficient, he may be committed to prison for three months. A right of appeal to the quarter-sessions from the order of justices is, however, given to the putative father, on his giving security for costs. The money payable under such an order is given to the

[a] Co. Litt. 235. [b] Lord Raym. 68; Comb. 356. [c] Nov. 89, c. 15.

mother; but if she be dead, or insane, or in prison, or under sentence of transportation, the justices may appoint some other person to have the custody of the child and receive the money. If such person misapply the money, or withhold proper nourishment from the child, or otherwise abuse or maltreat it, he or she is liable to a fine of 10*l.*'

'But whether an order of maintenance on the putative father be obtained or not, the mother (who is entitled to the custody of her child, in preference to the father)[d] is, in any case, bound to maintain it; and if, being of ability, wholly or in part, she neglects do so, whereby the child becomes chargeable to the parish, she may be punished as an idle and disorderly person under the Vagrant Act, 5 Geo. IV. c. 83; and on a second conviction, is punishable as a rogue and vagabond under the same statute.'[e]

3. Rights and incapacities of bastards.

3. I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can *acquire;* for he can *inherit* nothing, being looked upon as the son of nobody; and sometimes called *filius nullius,* sometimes *filius populi.*[f] Yet he may gain a surname by reputation,[g] though he has none by inheritance. All other children have their primary settlement in their father's parish; [459] but a bastard in 'that of his mother.'[h]

The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius,* he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church;[i] but this doctrine seems now absolete; and in most other respects there is no distinction between a bastard and another man. And really any other distinction but that of not inheriting, which civil policy renders necessary, would,

[d] *Rex* v. *Hopkins,* 7 East, 579; ex p. *Keene,* 1 Bos. & Pul. N. R. 148.

[e] 7 & 8 Vict. c. 101; 8 & 9 Vict. c. 10.

[f] Fort. de LL. c. 40.

[g] Co. Litt. 3.

[h] '4 & 5 Will. IV. c. 76, s. 71. Previously to this statute, a bastard's settlement was in general in the parish of its birth (Salk. 427); in some cases in that of the mother.' (17 Geo. II. c. 5; 13 Geo. III. c. 32.)

[i] Fortesc. c. 40; 5 Rep. 58.

with regard to the innocent offspring of his parent's crimes, be odious, unjust, and cruel to the last degree: and yet the civil law, so boasted of for its equitable decisions, made bastards in some cases incapable even of a gift from their parents.[j] A bastard may, lastly, be made legitimate and capable of inheriting by the transcendent power of an Act of Parliament, and not otherwise;[k] as was done in the case of John of Gaunt's bastard children, by a statute of Richard II.

[j] Cod. 6, 57, 5.

[k] 4 Inst. 36.

CHAPTER XVII.

OF GUARDIAN AND WARD.

THE only general private relation now remaining to be discussed, is that of guardian and ward; which bears a very near resemblance to the last, and is plainly derived out of it: the guardian being only a temporary parent, that is, for so long a time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians, how they are appointed, and their power and duty; next, the different ages of persons, as defined by the law: and, lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship. [460]

The guardian with us performs the office both of the *tutor* and *curator* of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the Court of Chancery, the *tutor* was the committee of the person, the *curator* the committee of the estate. But this office was frequently united in the civil law;[a] as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

1. Of the several species of guardians, the first are guardians *by nature;* viz. the father and (in some cases) the mother of the child. 'This guardianship is a mere personal right in the father or other ancestor, to the custody of the *person* of the infant, until he or she attains twenty-one years of age.'[b] For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits.[c] [461]

1. Guardians *by nature.*

2. There are also guardians *for nurture;*[d] which are the father, or 'if he be dead, the' mother,[e] till the infant attains

2. Guardians *for nurture.*

[a] Ff. 26, 4, 1.

[b] Co. Litt. by Harg. 88, n. 63-71; *Reg.* v. *Thorp*, Carth. 386.

[c] Co. Litt. 88.

[d] Co. Litt. 88.

[e] Stra. 1131; Burr. Sett. Ca. 149.

the age of fourteen years; 'a guardianship which, like that by nature, has no reference to the infant's property, but relates merely to his person.'[f] In default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education.[g]

3. Guardians *in socage.*

3. Next are guardians *in socage* (an appellation which will be fully explained in the Second Book of these Commentaries), who are also called guardians *by the common law.* These take place only when the minor is entitled to some estate in lands,[h] and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend: as, where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian.[i] For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust.[j] The Roman laws proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed in the inheritance, presuming that the next heir would take the best care of an estate to which he has a prospect of succeeding: and this they boast to be
[462] "*summa providentia.*"[k] But in the meantime they seem to have forgotten, how much it is the guardian's interest to remove the incumbrance of his pupil's life from that estate for which he is supposed to have so great a regard.[l] 'And this affords Fortescue,[m] and Sir Edward Coke,[n] an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is the next in succession is "*quasi agnum committere lupo, ad devorandum.*"[o] These guardians in

[f] Moor. 738; 3 Rep. 38.

[g] 2 Jones, 90; 2 Lev. 163.

[h] 'By descent, *Quadring* v. *Downs*, 2 Mod. 176.'

[i] Litt. § 123.

[j] *Nunquam custodia alicujus de jure alicui remanet, de quo habeatur suspicio, quod possit vel velit aliquod jus in ipsâ hæreditate clamare.* (Glanv. l. 7, c. 11.)

[k] Ff. 26, 4, 1

[l] The Roman satirist was fully aware of this danger when he puts this private prayer into the mouth of a selfish guardian:—

—*pupillum o utinam, quem proximus hæres*
Impello, expungam. Pers. 1, 12.

[m] C. 44.

[n] Co. Litt. 88, b.

[o] See Stat. Hibern. 14 Hen. III. This policy of our English law is warranted by the wise institutions of Solon, who

socage, like those for nurture, continue only till the minor is fourteen years of age;[p] for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian.

4. For this he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry* (which lasted till the age of twenty-one, and of which we shall speak hereafter), enacts, that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, either in possession or reversion, till such child attains the age of one-and-twenty years. These are called guardians by *statute*,[q] or *testamentary* guardians. 'The Act of Charles II., it will be observed, enables the father only to appoint guardians; it confers no such power on the mother,[r] and it does not extend to a putative father, nor a person *in loco parentis:* though the Court of Chancery, in the exercise of its general jurisdiction over infants, pays great attention to nominations of guardians by such testators.'[s]

4. Guardians *by statute.*

5. 'Guardians may be chosen or elected by the infant, on attaining fourteen; but this kind of guardianship, which is quite unknown in practice, seems not to extend beyond giving the consent to marriage required by the statutes mentioned in a previous part of this volume; and the infant's election, it may be added, in no case supersedes the jurisdiction of the Court of Chancery.'[t] For the lord chancellor is, by right derived from the Crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is,

5. Guardianship *by election.*

provided that no one should be another's guardian, who was to enjoy the estate after his death. (Potter's Antiq. b. 1, c. 26). And Charondas, another of the Grecian legislators, directed that the inheritance should go to the father's relations, but the education of the child to the mother's, that the guardianship and right of succession might always be kept distinct. (Petit. Leg. At l. 6, t. 7.)

[p] *Wade* v. *Baker*, 1 Ld. Raym. 131.

[q] 'Sir William Blackstone mentions, under the head of guardianship *by nature*, one species of guardianship which seems to have been by *statute* only, viz., that which occurred where a father assigned a guardian to a woman child under sixteen, by virtue of the statute 4 & 5 P. & M. c. 8. That Act has been repealed by the statute 9 Geo. IV. c. 31.'

[r] Vaughan's Rep. 180.

[s] *Chatteris* v. *Young*, 1 Jac. & Walk. 106.

[t] *Curtis* v. *Rippon*, 4 Madd. 462.

of all such persons as have not discretion enough to manage their own concerns.

6. Guardianship by appointment of the Lord Chancellor.

6. 'This jurisdiction of the Court of Chancery, whatever may have been its origin, is now firmly established, and beyond the reach of controversy;[u] it being a settled maxim that the sovereign is the universal guardian of all the infants in the kingdom. This court, therefore, will appoint a suitable guardian for an infant, where there is no other, or no other who will or can act; for if there are testamentary guardians, the court has no jurisdiction to do so. It will also, in general, abstain from interference, unless the infant has property; not from any want of jurisdiction, but from the want of means to exercise its authority with effect. When, however, guardians are appointed, and their nomination is entirely a matter of discretion, they are treated as officers of the court, and are held responsible accordingly.'[v]

'The Court of Chancery will not only remove guardians appointed by its own authority, but it will also remove guardians at the common law, and even testamentary or statute guardians, whenever sufficient cause can be shown for so doing. For guardianship is always looked upon by the courts of equity as a delegated trust for the benefit of the infant;' and in case therefore any guardian abuses his trust, the court will check and punish him; nay, sometimes will proceed to the removal of him, and appoint another in his stead.[w] 'The court will sometimes also require security to be given by the guardian, and on the other hand will assist him in the performance of his duties, as well in obtaining the custody of the person of the ward as otherwise.'

'The jurisdiction of the Court of Chancery extends to the care of the person of the infant, so far as is necessary for his protection and education, and to the care of his property, for its management and preservation, and proper application for his maintenance. It is upon the former ground that the court interferes with the ordinary rights of parents, as guardians by nature or by nurture; for whenever a father is guilty of gross ill-treatment of or cruelty to his children, or is in constant habits

[u] *Wellesley* v. *Wellesley*, 2 Bligh, N.S. 124-145.

[v] Story's Eq. Jur. vol. ii. ch. 35.

[w] 1 Sid. 424; 1 P. Wms. 703.

of drunkenness and blasphemy, or low and gross debauchery, or professes atheistical or irreligious principles, or his domestic associations are such as tend to the corruption and contamination of his children, the court will interpose and deprive him of the custody of the infants, appointing at the same time a suitable person to act as guardian, and superintend their education. And this interference may be obtained on the petition of the infant himself, or of any of his friends or relatives; nay, a mere stranger may at any time set the machinery of the court in motion. In most instances, however, its jurisdiction arises from a suit being actually pending relative to the person or property of the infant; and in such cases, although not under the care of any guardian appointed by the court, the infant is treated as a ward.'

Wards in Chancery.

'And a ward in Chancery is in all cases under the special protection of the court; for no act can be done affecting the minor's person, property, or estate, unless under its express or implicit direction, every act done without such direction being considered a contempt, exposing the offender to be attached and imprisoned. Thus it is a contempt to conceal or withdraw the person of the infant from the proper custody, or to disobey any order of the court relative to its maintenance or education, or to marry the infant without the approbation of the court. For the court, in approving a person to be guardian, usually gives him express directions how to exercise the powers which it has conferred; prescribes the residence, and settles a scheme for the education of the infant; and regulates, if necessary, his choice of a profession or trade; approves or prohibits the minor's marriage; and performs all the other duties of guardians by nature or for nurture. With respect to the property of the ward, the court not only superintends its management during the owner's minority but directs a proper settlement on the marriage of its ward; and this protection is not always removed upon the minor's attaining twenty-one; but is, for some purposes, continued afterwards, especially with regard to the marriage of female wards. In these and other respects,[x] therefore, guardians

[x] 'The guardian, for instance, may represent infants under the Acts authorizing advances of public money for draining (13 & 14 Vict. c. 31, s. 6); he may concur in a special case for the opinion of the Court of Chancery (13 & 14 Vict. c. 35, s. 4); he may consent to the reduction or extinguishment of

appointed by the Court of Chancery have extensive delegated powers; this species of guardianship being one far more capable of adaptation to the various requirements of modern society, the intentions of testators, the wants and wishes of the infants themselves, and the different kinds of property which may call for administrative care, than all or any of the other guardianships known to the law.'

'The Court of Chancery has a statutory authority to appoint a guardian for the purpose of consenting to the marriage of any infant who has no father or unmarried mother, or other guardian;[y] and may also give an effectual consent to the marriage of a minor, when the consent required by law cannot be obtained, or is improperly withheld.[z] The court may also, by statute 3 & 4 Vict. c. 90, confer all the rights of a guardian, to the exclusion of the parents or other guardians, on any person who is willing to take the charge of, and to provide for the maintenance and education of an infant, who has been convicted and suffered the punishment of felony.'

7. Guardians *ad litem.*

7. 'A guardian *ad litem*, or, as he is in general termed, a *prochein amy* or next friend, is one who is appointed by the court to prosecute the suit, or manage the defence of an infant.' This *prochein amy* may be any person who will undertake the infant's cause; and it frequently happens that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. 'The *prochein amy* (who is usually the father) acquires by this kind of guardianship no authority over the person or property of the infant, except as regards the suit itself; but as he possesses all the authority and incurs all the responsibility for costs and otherwise of an ordinary suitor, the court will not allow him, if an uncertificated bankrupt or an insolvent, to act as a guardian *ad litem*.'[a]

8. Guardians *by custom.*

8. There are also special guardians, 'such as guardians in *gavelkind*, whose authority does not cease till the infant attains fifteen years of age, and guardians by the *custom* of

interest on turnpike securities (14 & 15 Vict. c. 38, s. 2); and he may represent infants in the winding up of joint-stock companies (11 & 12 Vict. c. 45, s. 39; 12 & 13 Vict. c. 108, s. 9).'

[y] 4 Geo. IV. c. 76, s. 16.

[z] See *ante*, p. 457.

[a] *Watson* v. *Fraser*, 8 M. & W. 660; *Ditchitt* v. *Satchwell*, 12 M. & W. 779.

London and other places;[b] but they are particular exceptions, and do not fall under the general law.

Power and duties of guardian.

The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child; and therefore I shall not repeat them; but shall only add, that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, [463] and must answer for all losses by his wilful default or negligence. In order, therefore, to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the Court of Chancery, acting under its direction, and accounting annually before the officers of that court.[c]

2. For whom guardians are appointed.

2. Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is that is said to be within age. The ages of male and female are different for different purposes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian,[d] may be an executor, 'although he cannot act until of age;'[e] and at *twenty-one* is at his own disposal, and may alien 'and devise' his lands, goods, and chattels. A female also at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth;[f] who till that time is an infant, and so styled in law. Among the ancient Greeks and Romans, *women* were never of age, but subject to [464]

[b] Co. Litt. 88: Bac. Abr. A. 2; Robinson on Gavelkind, 237.

[c] Ex p. *Whitfield*, 2 Atk. 316.

[d] Formerly, if a minor's discretion were actually proved, he or she might make a testament of personal estate (Bl. Com. vol. i. p. 463); but a minor can in no case now make a will. (See *post*, vol. ii. p. 527.)

[e] 38 Geo. III. c. 87, s. 6; *post*, vol. ii. p. 533.

[f] Salk. 44, 625; Lord Raym. 480, 1096; *Toder* v. *Sansam*, Dom. Proc. 27 Feb. 1775.

perpetual guardianship,[g] unless when married, "*nisi convenissent in manum viri*:" and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not till twenty-five years.[h] Thus by the constitution of different kingdoms, this period, which is merely arbitrary, and *juris positivi*, is fixed at different times. Scotland agrees with England in this point, both probably copying from the old Saxon constitutions on the continent, which extended the age of minority "*ad annum vigesimum primum, et eo usque juvenes sub tutelam reponunt.*"[i]

3. Privileges and disabilities of infants.

3. Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise;[j] but he may sue either by his guardian, or, 'as we have already seen, by his' *prochein amy*, his next friend who is not his guardian.[k] In criminal cases, an infant of the age of *fourteen* years may be capitally punished for any capital offence;[l] but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty: for the infant shall, generally speaking, be judged *primâ facie* innocent: yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, though he has not attained to years of
[465] puberty or discretion.[m] And Sir Matthew Hale gives us two instances; one of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companion and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil: and in such cases the maxim of law is, that *malitia supplet ætatem.* So also, in much more modern times, a boy of ten years old, who was

g Pott. Antiq. b. 4, c. 11; Cic. pro Muren. 12.

h Inst. 1, 23, 1.

i Stiernhook, *de Jure Sueonum*, l. 2, c. 2. This is also the period when the king, as well as the subject, arrives at full age in modern Sweden.

j Co. Litt. 135.

k 'An infant may sue for *wages* in the county court as if he were of full age.' (9 & 10 Vict. c. 95, s. 64.)

l 1 Hal. P. C. 25; see *post*, vol. iv. p. 20.

m 1 Hal. P. C. 26.

guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges.[n]

With regard to estates and civil property, an infant has many privileges, which will be better understood when we come to treat more particularly of those matters; but this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases.

It is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions: part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot alien their estates: but infant trustees, or mortgagees, are enabled to convey, under the direction of the Court of Chancery, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court 'shall appoint;[o] a mode of transfer not always necessary, since the court can effect the same object by its own order.[p] So, infants may make conveyances and mortgages under order of the court in suits for the payment of debts,[q] and with the consent of the court may make valid settlements of either real or personal estate on their marriage.'[r] Also it is generally true, that an infant can do no legal act: yet an infant, who has an advowson, may present to the benefice when it becomes void.[s] For the law in this case dispenses with one rule, in order to [466] maintain others of far greater consequence: it permits an infant, 'at least with the concurrence of the guardian,'[t] to present a clerk (who, if unfit, may be rejected by the bishop) rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right

[n] Foster, 72.

[o] 7 Ann. c. 19; 4 Geo. III. c. 16; '11 Geo. IV. and 1 Will. IV. cc. 60 & 65.'

[p] 13 & 14 Vict. c. 60: 15 & 16 Vict. c. 55.

[q] 11 Geo. IV. and 1 Will. IV. c. 47, s. 11; 2 & 3 Vict. c. 60; 11 & 12 Vict. c. 87.

[r] 18 & 19 Vict. c. 43.

[s] Co. Litt. 172.

[t] *Shopland* v. *Ryder*. Cro. Jac. 99; Harg. Co. Litt. 89 a. n. 71.

by lapse to the bishop. An infant may also purchase lands, but his purchase is incomplete; for when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement.[u] It is, farther, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable;[v] yet in some cases he may bind himself apprentice by deed indented or indentures for seven years;[w] and he may by deed appoint a guardian to his children, if he has any.[x] Lastly, it is generally true, that an infant can make no other contract that will bind him:[y] yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries;[z] and likewise for his good teaching and instruction, whereby he may profit himself afterwards.[a] 'But the contract of an infant, not for necessaries, would seem to be *voidable* only and not void, if for his benefit;[b] and therefore, if it be ratified by him on his attaining full age, he will be bound by it. Thus a lease made by him while an infant is voidable; but if he accepts rent at full age, he cannot afterwards avoid the demise.[c] So if after attaining majority he remains in possession of premises leased to him during his infancy, he affirms the lease, and is liable even for arrears of rent accrued during his nonage.[d] But as to any other contract than one for necessaries, or for his benefit, he is not bound by it, unless it be ratified by him in writing[e] after he attains majority.' And thus much, at present, for the privileges and disabilities of infants.

[u] Co. Litt. 2.

[v] Ex p. *Davis*, 5 T. R. 715.

[w] Stat. 5 Eliz. c. 4; 43 Eliz. c. 2; Cro. Car. 179; *Rex* v. *Great Wigston*, 3 B. & C. 485.

[x] Stat. 12 Car. II. c. 24. 'This he might formerly do by *will;* but an infant cannot now make a will. (7 Will. IV. and 1 Vict. c. 26, s. 7.')

[y] He may invest money in the savings' bank (9 Geo. IV. c. 92, s. 25); and in certain cases, if fourteen years of age, may execute a power of attorney to withdraw the deposits (7 & 8 Vict. c. 87, s. 7); and may be a member of, and execute instruments relating to, friendly societies (18 & 19 Vict. c. 63, s. 15).

[z] *Smith* v. *Willins*, 4 El. & Bl. 180.

[a] Co. Litt. 172.

[b] *Gibbs* v. *Merrill*, 3 Taunt. 307; *Goode* v. *Harrison*, 5 B. & Ald. 159.

[c] *Ashfield* v. *Ashfield*, Sir William Jones, 157.

[d] 1 Roll. Abr. *Enfants; Kirton* v. *Elliott*, 3 Bulst. 69; *Evelyn* v. *Chichester*, 3 Burr. 1719.

[e] 9 Geo. IV. c. 14; *Mawson* v. *Blane*, 10 Ex. 206. See, as to the liability of infant partners of joint-stock companies, *Dublin and Wicklow Railway Company* v. *Black*, 8 Ex. 181.

CHAPTER XVIII.

OF CORPORATIONS.

WE have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person, and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. [467]

These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations; of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To show the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this was a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could neither frame nor receive any laws or rules of their conduct; none at [468]
least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for if such privileges be attacked, which of all this unconnected assembly has the right or ability to defend them? And, when they are dispersed by death or otherwise, how shall they

transfer these advantages to another set of students, equally unconnected as themselves?

So also with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed.

But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws; the privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested without any new conveyance, to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

Origin of corporations.

The honour of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdi-
[469] vide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law,[a] in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together; they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation; particularly with regard to sole

[a] Ff. l. 3, t. 4, per tot.

corporations, consisting of one person only, of which the Roman lawyers had no notion; their maxim being, that "*tres faciunt collegium.*"[b] Though they held, that if a corporation originally consisting of three persons, be reduced to one, "*si universitas ad unum redit,*" it may still subsist as a corporation "*et stet nomen universitatis.*"[c]

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

Corporations aggregate.

The first division of corporations is into *aggregate* and *sole.* Corporations *aggregate* consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations *sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the sovereign is a sole corporation;[d] so is a bishop; so are some deans, and prebendaries, distinct from their several chapters; and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the original endowment of [470] parish churches, the freehold of the church, the churchyard, the parsonage-house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances; or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, *quatenus* parson, shall

Corporations sole.

[b] Ff. 50, 16, 8. [c] Ff. 3, 4, 7. [d] Co. Litt. 43.

never die, any more than the sovereign: by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also.

Ecclesiastical corporations.

Another division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons; such as bishops; certain deans, and prebendaries; all archdeacons, parsons, and vicars; which are sole corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are erected for the furtherance of religion, and perpetuating the rights of the church.

Lay corporations.

Lay corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes. The sovereign, for instance, is made a corporation to prevent in general the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possessions of the Crown entire; for immediately upon the demise of one sovereign, his successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like; some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns; and some for the better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish: the Colleges of Physicians and Surgeons in London, for the improvement of the medical science; the Royal Society for the advancement of natural knowledge; and the Society of Antiquaries for promoting the study of antiquities. And among these the general corporate bodies of the universities of Oxford and Cambridge must be ranked: for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy:[e] neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any

Municipal corporations.

[471]

Trading corporations.

[e] 'See the observations of Lord Mansfield, in 3 Burr. 1656.'

more than other corporations where the acting officers have standing salaries; for these are rewards *pro operâ et labore*, not charitable donations only, since every stipend is preceded by service and duty; they seem therefore to be merely civil corporations. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent: and all colleges, both *in* our universities, and *out*[f] of them: which colleges are founded for two purposes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons,[g] and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies. Eleemosynary corporations.

'These are' the several species of corporations 'known to our law. Of some of them, which possess peculiar qualities, and of others which have not all the usual incidents of a corporation, I shall treat separately; and with this view shall consider:—First, Corporations *in general*; Secondly, *Municipal* Corporations; and Thirdly, *Trading* Corporations.' [472]

Let us then proceed to consider, 'with reference to corporations in general,' 1. How corporations may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And, 4. How they may be dissolved. I. CORPORATIONS IN GENERAL.

1. Corporations, by the civil law, seem to have been created by the mere act and voluntary association of their members: provided such convention was not contrary to law, for then it was *illicitum collegium*.[h] It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these 1. How created.

[f] Such as at Manchester, Eton, Winchester, &c.

[g] 1 Lord Raym. 6.

[h] Ff. 47, 22, 1. *Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur; nam et legibus, et senatus consultis, et principalibus constitutionibus ea res coercetur.* (Ff. 3, 4, 1.)

voluntary and friendly societies (for they were little more than such) should not establish any meetings in opposition to the laws of the state.

By consent of the Crown.

But, with us in England, the consent of the Crown is absolutely necessary to the erection of any corporation, either impliedly or expressly given.[i] The sovereign's implied consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence; common law being nothing else but custom, arising from the universal agreement of the whole community. Of this sort are the sovereign himself, all bishops, parsons, vicars, churchwardens, and some others; who by common law have ever been held (as far as our books can show us) to have been corporations, *virtute officii:* and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit his rights to his successors, at the same time.
[473] Another method of implication, whereby the consent of the Crown is presumed, is as to all corporations by *prescription*, such as the city of London, and many others,[j] which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity, the law presumes there once was one; and that by the variety of accidents which a length of time may produce, the charter is lost or destroyed.

By Act of Parliament.

The methods by which the consent of the Crown is expressly given, are either by Act of Parliament or charter. By Act of Parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created;[k] but it is observable, that (till of late years) most of those statutes, which have been usually cited as having created corporations, either confirmed such as had been before created by the

[i] Cities and towns were first erected into corporate communities on the continent, and endowed with many valuable privileges, about the eleventh century (Roberts. Cha. V. i. 30); to which the consent of the feudal sovereign was absolutely necessary, as many of his prerogatives and revenues were thereby considerably diminished.

[j] 2 Inst. 330.

[k] 10 Rep. 29; 1 Roll. Abr. 512.

sovereign; as in the case of the College of Physicians erected by a charter of Henry VIII.,[l] which charter was afterwards confirmed in Parliament;[m] or they enabled the sovereign to erect a corporation *in futuro* with such and such powers: as is the case of the Bank of England[n] and the Society of the British Fishery.[o] 'For although it was always in the power of the Crown to confer on any set of individuals the privileges of a corporation, such as a common seal and perpetual succession, to sue and be sued, and receive and convey by its corporate name; yet there were many powers which the Crown could not by its prerogative, but which Parliament alone could, confer.'

'Formerly, indeed, when the want of these powers was not much felt,' the immediate creative act was usually performed by the sovereign alone, in virtue of the royal prerogative. 'But in modern times corporations have been usually created either directly and immediately by Act of Parliament, of which species railway companies are a well-known example; or created by the Crown or formed by a prescribed number of private individuals, under the authority of Acts of Parliament passed for the purpose. Thus the Crown is enabled by the statute 5 & 6 Will. IV. c. 76, to grant charters of incorporation to populous towns, which are thenceforth to have the municipal government, powers of police, and other privileges conferred on such corporations by the legislature, the most important of which is the right to levy rates for municipal and other purposes. Of corporations again, formed by private individuals under the provisions of an Act of Parliament, registered joint-stock companies are familiar instances.' The creation of a corporation by the Crown may be performed by the words "*creamus, erigimus, fundamus, incorporamus*," or the like. Nay, it is held, that if the sovereign grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly,[p] this is alone sufficient to incorporate and establish them for ever.[q] [474]

[l] 8 Rep. 114.

[m] 14 & 15 Hen. VIII. c. 5.

[n] Stat. 5 & 6 W. & M. c. 20.

[o] Stat. 23 Geo. II. c. 24.

[p] *Gild* signified among the Saxons a fraternity, derived from the verb *gildan*, to pay, because every man paid his share towards the expenses of the community; and hence their place of meeting is frequently called the *Guild*, or *Guild-hall*.

[q] 10 Rep. 30; 1 Roll. Abr. 513.

The sovereign (it is said) may grant to a subject the power of erecting corporations,[r] though the contrary was formerly held;[s] that is, he may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the Crown that erects, and the subject is but the instrument: for, though none but the sovereign can make a corporation, yet *qui facit per alium facit per se*.[t] In this manner the chancellor of the University of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies of tradesmen subservient to the students. 'So by one of the charters of the city of London, power is given to the corporation to establish companies, fraternities, and guilds, which are to be subject to the general control of the civic authorities.'

Parliament may incorporate.

The parliament, we observed, by its absolute and transcendent authority, may perform this or any other act whatsoever: and actually did perform it to a great extent, by statute 39 Eliz. c. 5, which incorporated all hospitals and houses of correction founded by charitable persons, without farther trouble, and the same has been done in other cases of charitable foundations. In this particular instance it was done, as Sir Edward Coke observes,[u] to avoid the charges of incorporation and licenses of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works. 'So the parliament may remodel any existing corporations, as was done by the statute 4 & 5 Will. IV. c. 76, usually called the Municipal Corporation Reform Act; by which all laws, statutes, and usages, and so much of all royal and other charters, grants, and letters patent then in force, relating to 178 corporations, were, so far as inconsistent with its provisions, repealed; and the constitution, privileges, powers, capacities and incapacities of all these bodies assimilated in all respects.'

A name is essential to a corporation.

[475] When a corporation is erected, a *name* must be given to it; and by that name alone it must sue and be sued, and do all legal acts; though a very minute variation therein is not material.[v] Such name is the very being of its constitution;

[r] Bro. Abr. tit. *Prerog.* 53; Viner. *Prerog.* 88. pl. 16.

[s] Year-book, 2 Hen. VII. 13.

[t] 10 Rep. 33.

[u] 2 Inst. 722.

[v] 10 Rep. 122.

and though it is the will of the sovereign that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions.[w] The name of incorporation, says Sir Edward Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the king baptizes the incorporation.[x]

2. After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider.[y] Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course.[z] As, 1. To have perpetual *succession*. This is the very end of its incorporation: for there cannot be a succession for ever without an incorporation;[a] and therefore all aggregate corporations have a power necessarily implied of *electing* members in the room of such as go off.[b] 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors; which two are consequential to the former. 4. To have a common seal. For a corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole.[c] 5. To make by-laws or private statutes for the better government of the corporation;[d] which are binding upon themselves, unless

2. Capacities and incapacities of corporations.

(1.) Perpetual succession.

(2.) To sue and be sued.

(3.) To hold lands.

(4.) Common seal.

(5.) By-laws.

[w] Gilb. Hist. C. P. 182. A name, it is said, may be *implied* (1 Salk. 191); and in some corporations it may be changed. (*Reg.* v. *Registrar of Joint Stock Companies*, 10 Q. B. 839.)

[x] 10 Rep. 28.

[y] 'Those about to be mentioned chiefly relate to corporations established by charter or prescription, and not in general to modern corporations created by statute, or under the powers, and of course subject to the provisions, of Acts of Parliament.'

[z] 10 Rep. 30; Hob. 211.

[a] 10 Rep. 26.

[b] 1 Roll. Abr. 514.

[c] Dav. 44, 48.

[d] *Piper* v. *Chappell*, 14 M. & W. 624.

contrary to the laws of the land,[e] 'or inconsistent with their charter,[f] or unreasonable,'[g] and then they are void. This is also included by law in the very act of incorporation:[h] for as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic. And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the Twelve Tables at Rome.[i] These five powers are inseparably incident to every corporation, at least to every corporation *aggregate:* for two of them, though they may be practised, yet are very unnecessary to a corporation *sole;* viz. to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

Incidents peculiar to aggregate corporations.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole: the reason of them ceasing, and of course the law. It must always appear by attorney; for it cannot appear in person, being, as Sir Edward Coke says,[j] invisible, and existing only in intendment and consideration of law. It can neither maintain, nor be made defendant to, an action of battery or such-like personal injuries; for a corporation can neither beat nor be beaten, in its body politic;[k] 'but it may sue and be sued for breaches of contract.' A corporation cannot commit treason or felony, or other crime, in its corporate capacity;[l] 'yet it may be indicted in certain cases for acts of omission, as for the non-repair of a bridge or a highway, when this duty is imposed on it by law.' Neither is a corporation capable of suffering a traitor's or felon's punish-
[477] ment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or

[e] '*Rex* v. *The Coopers' Company of Newcastle*, 7 T. R. 543.' No trading company is, with us, allowed to make by-laws which may affect the king's prerogative, or the common profit of the people, under penalty of 40*l.*, unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits; and, even though they be so approved, still, if contrary to law, they are void. Bl. Com. vol. i. p. 476. (Stat. 19 Hen. VII. c. 7; 11 Rep. 54.)

[f] *Rex* v. *Cutbush*, 4 Burr. 2204.

[g] *Carter* v. *Sanderson*, 5 Bing. 79.

[h] Hob. 211.

[i] *Sodales legem quam volent, dum ne quid ex publicâ lege corrumpant, sibi ferunto.*

[j] 10 Rep. 32.

[k] Bro. Abr. tit. *Corporation*, 63.

[l] 10 Rep. 32.

administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seised of lands to the use of another;[m] for such kind of confidence is foreign to the end of its institution. Neither can it be committed to prison;[n] for its existence being ideal, no man can apprehend or arrest it. And therefore also it cannot be outlawed: for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do.[o] Neither can a corporation be excommunicated: for it has no soul, as is gravely observed by Sir Edward Coke:[p] and therefore it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ*, and their sentences can only be enforced by spiritual censures: a consideration which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

Other incidents of some corporations.

There are also other incidents and powers, which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot;[q] for such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the sovereign or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corporations merely lay, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own by-laws, not contrary to the laws of the realm.[r] Aggregate corporations also, that have by their constitution a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such

[m] Bro. Abr. tit. *Feoffm. al. Uses*, 40; Bacon on Uses, 347.

[n] Plowd. 558.

[o] For these reasons the proceedings to compel a corporation to appear to any suit by attorney 'were formerly in all civil cases, and in criminal cases still are,' by distress on their lands and goods (Bro. Abr. tit. *Corporation*, 11; Outlawry, 72). As to service of writs and bills on corporations, see *post*, vol. iii. pp. 306, 514; and as to criminal process against them, *post*, vol. iv. p. 378.

[p] 10 Rep. 32.

[q] Co. Litt. 46.

[r] Lord Raym. 8.

corporation is incomplete without a head.[s] Yet there may be a corporation aggregate constituted without a head;[t] as the collegiate church of Southwell in Nottinghamshire, which consists only of prebendaries; and the Governors of the Charter-House, London, who have no president or superior, but are all of equal authority. In aggregate corporations also, the act of the major part is esteemed the act of the whole.[u] By the civil law this major part must have consisted of two-thirds of the whole; else no act could be performed;[v] which perhaps may be one reason why they required three at least to make a corporation. But, with us, *any* majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act (which King Henry VIII. found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations), it was therefore enacted by statute 33 Hen. VIII. c. 27, "that all private statutes shall be utterly void, "whereby any grant or election, made by the head, with "the concurrence of the major part of the body, is liable "to be obstructed by any one or more, being in the "minority;" but this statute extends not to any negative or necessary voice given by the founder to the head of any such society.

We before observed that it was incident to every corporation to have a capacity to purchase lands for themselves and
[179] successors; and this is regularly true at the common law.[w] But they are excepted out of the statute of wills:[x] so that no devise of lands to a corporation by will is good: except for charitable uses, by statute 43 Eliz. c. 4:[y] which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also, by a great variety of statutes,[z] their privilege even of purchasing from any living grantor is much abridged; so that a corporation, either ecclesiastical or lay, must have now

Statutes of charitable uses.

[s] Co. Litt. 263, 264.

[t] 10 Rep. 30.

[u] Bro. Abr. tit. *Corporation*, 31, 34.
'*Rex* v. *Monday*, Cowp 530.'

[v] Ff. 3, 4, 3.

[w] 10 Rep. 30.

[x] 34 Hen. VIII. c. 5.

[y] Hob. 136.

[z] From *Magna Charta*, 9 Hen. III. c. 36, to 9 Geo. II. c. 36.

a licence from the Crown to purchase,[a] before they can exert that capacity which is vested in them by the common law; nor is even this in all cases sufficient. These statutes are generally called the statutes of *mortmain:* all purchases made by corporate bodies being said to be purchases in *mortmain, in mortuâ manu:* for the reason of which appellation Sir Edward Coke[b] offers many conjectures; but there is one which seems more probable than any that he has given us, viz., that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore, holden by them, might with great propriety be said to be held *in mortuâ manu.* Statutes o mortmain.

I shall defer the more particular exposition of these statutes of mortmain till the next book of these Commentaries, when we shall consider the nature and tenures of estates; and also the exposition of those disabling statutes of Queen Elizabeth, which restrain spiritual and eleemosynary corporations from alienating such lands as they are at present in legal possession of; only mentioning them in this place, for the sake of regularity, as statutable incapacities incident and relative to corporations.

The general *duties* of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder. Duties of bodies politic. [480]

3. I proceed therefore next to inquire, how these corporations may be *visited.* For corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. 3. How corporations may be visited.

With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from Ecclesiastical corporations.

[a] By the civil law a corporation was incapable of taking lands, unless by special privilege from the emperor; *collegium, si nullo speciali privilegio subnixum sit, haereditatem capere non posse, dubium non est.* (Cod 6, 24, 8.)

[b] 1 Inst. 2.

thence derived to us. The pope formerly, and now the sovereign, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and all other spiritual corporations.

Lay corporations. With respect to all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation the ordinary neither can nor ought to visit.[c] I know it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land; and this shall be presently explained. But first, as I have laid it down as a rule that the founder, his heirs or assigns, are the visitors of all lay corporations, let us inquire what is meant by the *founder.* The founder of all corporations in the strictest and original sense, is the sovereign alone, for he only can incorporate a society: and in civil incorporations, such as mayor and commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the sovereign: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two species of foundation; the one
[481] *fundatio incipiens,* or the incorporation, in which sense the sovereign is the general founder of all colleges and hospitals; the other *fundatio perficiens,* or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital.[d] But here the sovereign has his prerogative: for if he and a private man join in endowing an eleemosynary foundation, the sovereign alone shall be the founder of it. And, in general, the Crown being the sole founder of all civil corporations and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the sovereign; and of the latter to the patron or endower.

The sovereign being thus constituted by the law visitor of all

[c] 10 Rep. 31.

[d] 10 Rep. 33.

civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction, which is the Court of King's Bench: where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers, when they say that these civil corporations are liable to no visitation; that is, that the law having by immemorial usage appointed them to be visited and inspected by the sovereign their founder, in his own proper court, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority.[e] And this is so strictly true, that though King Henry VIII. by his letters patent had subjected the College of Physicians to the visitation of four very respectable persons, the lord chancellor, the two chief justices, and the chief baron; though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for nearly a century: yet, in 1753, the authority of this provision coming in dispute, on an [482] appeal preferred to these supposed visitors, they directed the legality of their own appointment to be argued: and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days' solemn debate, that they had no jurisdiction as visitors; and remitted the appellant (if aggrieved) to his regular remedy in His Majesty's Court of King's Bench.

Eleemosynary corporations visited by the founder.

As to eleemosynary corporations, by the dotation the founder and his heirs are of common right the legal visitors, to see that such property is rightly employed, as might otherwise have descended to the visitor himself: but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power in exclusion of his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the universities. These were all of them considered by the popish clergy as of mere ecclesiastical jurisdiction: however the law of the land judged

[e] This notion is, perhaps, too refined. The Court of Queen's Bench (it may be said), from its general superintendent authority where other jurisdictions are deficient, has power to regulate all corporations where no special visitor is appointed: but not in the light of *visitor;* for as its judgments are liable to be reversed by writs of error, it may be thought to want one of the essential marks of visitatorial power.

otherwise; and with regard to hospitals, it has long been held,[f] that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained, that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5, which directs the bishops to visit such hospitals only, where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit.[g]

Colleges in the universities (whatever the common law may now, or might formerly judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical*, corporations; and therefore the right of visitation was claimed by the ordinary of the
[183] diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprised, has immemorially exercised visitatorial authority: which can be ascribed to nothing else but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is not impossible, that the number of colleges in Cambridge, which are visited by the Bishop of Ely, may in part be derived from the same origin.

Power of visitors. But, whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are *lay* corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law.[h] And yet the power and

[f] Year-book, 8 Edw. III. 28; 8 Ass. 29. [g] 2 Inst. 725. [h] Lord Raym. 8.

jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Philips and Bury*.[i] In this the main question was, whether the sentence of the Bishop of Exeter, who (as visitor) had deprived Doctor Bury, the rector of Exeter College, could be examined and redressed by the Court of King's Bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But the Lord Chief Justice Holt was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party aggrieved ought to have redress; the founder having reposed in him so entire a confidence, [484] that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. And, upon this, a writ of error being brought into the House of Lords, they concurred in Sir John Holt's opinion, and reversed the judgment of the Court of King's Bench. To which leading case all subsequent determinations have been conformable.

It is said,[k] that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise, where he mistakes in a thing within his power. 'If no visitor has been appointed by the founder, the right of visitation in default of his heirs devolves upon the Crown, and is exercised by the Lord Chancellor, the King's Bench having no jurisdiction over such foundations.'[l]

3. We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting 3. How corporations are dissolved.

[i] Lord Raym. 5; 4 Mod. 106; Show. 35; Skinn. 407; Salk. 403; Carthew, 180.

[j] 'See Lord Holt's judgment, printed from his own MS., in 2 T. R. 346.'

[k] 2 Lutw. 1566.

[l] *Rex* v. *The Master and Fellows of St. Catherine's Hall, Cambridge*, 4 T. R. 233; ex p. *Wrangham*, 2 Ves. 619; re *Downing College*, 2 My. & Cr. 642.

contrary to the laws of the society, or the laws of the land; or he may resign it by his own voluntary act.[m] But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person or his heirs, who granted them to the corporation: for the law annexes a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth.[n] The grant is indeed only during the life of the corporation, which *may* endure for ever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities;[o] agreeably to that maxim of the civil law,[p] "*si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*"

[485] A corporation may be dissolved, 1. By Act of Parliament, which is boundless in its operations. 2. By the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the sovereign, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto,* to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law for the purposes of the state, in the reigns of King Charles and King James II., particularly by seizing the charter of the City of London, gave great and just offence; though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reversed by Act of Parliament[q] after the Revolution; and by the same statute it is enacted, that the franchises of the City of London shall never more be

[m] 11 Rep. 98.
[n] Co. Litt. 13.
[o] 1 Lev. 237.
[p] Ff. 3. 4. 7.
[q] See the Statute 2 Will. & Mary c. 8.

forfeited for any cause whatsoever. And, because by the common law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter or established by prescription, it is now provided,[r] that for the future no corporation shall be dissolved upon that account; and ample directions are given for appointing a new officer, in case there be no election, or a void one, made upon the prescriptive or charter day.

II. 'Hitherto of corporations in general, among which might formerly have been classed all those boroughs which are now regulated by the statute 4 & 5 Will. IV. c. 76. The provisions of that Act apply, as has been already stated, to 178 corporate towns; the remainder—including the City of London—sixty-eight in number, were not brought within its operation. London, the greatest of all, with its many wealthy trading companies, each a corporation in itself, was reserved for separate legislation; the others, being inconsiderable in their extent and population, still continue to be governed by their charters or prescriptive usages, like corporations existing at the common law.' II. MUNICIPAL CORPORATIONS.

'The provisions of the above-mentioned statute apply, however, to another and more modern class of municipal corporations, viz., those which have obtained charters of incorporation under the Act itself. For after reciting that sundry towns and boroughs of England and Wales were not towns corporate, and that it was expedient that several of them should be incorporated, the statute expressly enables the Crown, with the advice of the Privy Council, to grant a charter extending to the inhabitant householders of any such town or district to be described in the charter, the powers and provisions contained in the Act, notice of the petition for incorporation and of the time when it is to be taken into consideration by the Privy Council being previously given in the London Gazette.[s] Under this power various charters of incorporation have been granted to towns,[t] and such charters in some instances afterwards confirmed by special Acts of Parliament.

'The origin of our municipal corporations is to be found in

[r] Stat. 11 Geo. I. c. 4.

[s] 5 & 6 Will IV. c. 76, s. 141; 13 & 14 Vict c. 42.

[t] 'Manchester, Birmingham, Sheffield, and Bolton, have been thus incorporated.'

Origin of municipal corporations

the town communities, or *municipia*, which were first planted in Britain during the Roman occupation; an organization which would seem to have been afterwards adopted by the Anglo-Saxons, as it certainly formed a part of their great system of self-government, the towns being placed within the administrative care of a *borough* or *port-reve*, when the country districts or shires were put under the jurisdiction of the *shire-reve*. After the Conquest these elective reves were supplanted by a *vice-comes* in the shires, and a *bailiff* in the towns, officers appointed directly by the sovereign, and responsible to him alone. To rid themselves of the oppression of the Norman bailiffs, the towns offered to pay a larger revenue to the Exchequer, provided it were collected by themselves, than the king could obtain through his own officer; and in this way repurchased from the Crown the right of self-government which they had enjoyed before the Conquest. In some cases the old designation of borough or *port-reve* was resumed by the chief magistrate elected under the newly-granted franchise. In most he received the Norman appellation of *mayor;* in a few instances only was the title of bailiff retained.'

'This newly-acquired municipal freedom, so long as the boroughs remained excluded from *political* existence, was, however, subject to repeated encroachments by the successors of the Conqueror, chiefly to obtain pecuniary resources for their contests with the great vassals of the Crown. Hence the frequent forfeitures of the borough charters, and in many instances the repeated regranting, on payment of a fine, of the same franchises to the same place.[u] London itself, although from motives of expediency the most favoured of all the municipalities, was not exempt from extortion by these arbitrary stretches of power; which ultimately gave rise to that limitation of the prerogative embodied in the Great Charter, expressly declaring that all cities, boroughs, and ports shall have their liberties and free customs.'

'For many years, however, after this first assertion of their

[u] 'In many cases, however, perhaps in most of them, the renewal of the charters of the boroughs was obtained from the sovereign *de facto* in possession of the throne, in order to prevent any repudiation by him of the act of his predecessors; a precaution which seems to have resulted from the unsettled state of the succession to the Crown.'

independence, the Crown continued to levy *talliages* on the boroughs in the most oppressive and vexatious manner. The exercise of this prerogative, after citizens and burgesses had been summoned to parliament, by Edward I., contributed, among other causes, in 1297 (25 Edw. I.), to the enactments of the *statutum de tallagio non concedendo*, by which the political existence of the boroughs was solemnly recognized, and the right of taxing them arbitrarily finally relinquished.'

Boroughs represented in parliament.

'In the great national measure of 1327, which closed the calamitous reign of the second Edward, the representatives of the boroughs appear with the knights of the shires under the general name of "Commons," by whose counsel and assent, as well as that of the prelates, earls, barons, and other great men, it was stated in the writs issued to the sheriffs by Edward III., that his father had "removed himself," and that he had taken upon him the government of the realm. When the Commons afterwards declared to this prince "that "they would not be compelled by any of his statutes or ordi-"nances *made without their assent*," the king was too mindful of the popular concurrence in the revolution which had deposed his father, to oppose this assertion of the rights of the Commons. The contest between his misguided grandson and successor Richard II., and the great body of the nation, ended in the complete attainment by the Commons of that legislative character to which they had been tending since their first summons to parliament; the acquisition of which had the effect of reviving in the municipal bodies, by which they were elected, that political life which, since the Conquest, had been almost extinct.'

'For several centuries after the Conquest, however, any select body forming, within a municipal town, *a corporation*, in the modern sense of the term, was entirely unknown. The chief object of the Norman sovereigns in granting to the burgesses the right of electing a chief magistrate of their own was to obtain, under the penalty of a forfeiture of the franchise, punctual payment of the stipulated rent; and to insure at the same time in each locality as much internal peace and order, as was requisite to enable the community to perform this stipulation with exactness. The municipal body consisted of the resident and trading inhabitants paying scot and bearing lot, that is, sharing in the payment of the local taxes, and

Origin of freemen. the performance of local duties. Strangers residing temporarily in the town for purposes of trade had no voice in its affairs, as they incurred no liability to its burdens; birth, apprenticeship, and marriage (all titles to borough freedom of very remote antiquity) being so many modes of ascertaining the general condition of established residence. A title by purchase was obtainable by an individual previously unconnected with the community, in those days when admission to its freedom conferred peculiar advantages of trading; the right of bestowing the freedom by free gift was one necessarily inherent in the community, for the exercise of which they were not responsible to any authority whatever.'

'For the appointments of its officers, the imposition of taxes, the administration of justice, or the enacting of local laws, the whole community originally met in the Saxon *folk-mote*, called in country districts the *hundred*, or where held within doors the *husting* or *common hall;* but in course of time the affairs of the towns were often left in the hands of a committee of the more wealthy and influential inhabitants, who were annually elected to assist with their advice the mayor and other officers of the community. These persons were often tempted to seek the perpetuation of their authority without the necessity of an annual appeal to the popular voice, and even to usurp powers which it had not delegated at all. And as early as the reign of Henry III. we find the aldermen of London, and those calling themselves "the more discreet of the city," making an attempt to elect a mayor in opposition to the popular will; the election, however, ending in the triumph of the latter, in a general folk-mote held at St. Paul's Cross. Similar usurpations were often vigorously resisted by the community, the contests being sometimes so violent and obstinate as to lead to bloodshed.'

'In course of time, and especially when the representatives of the boroughs had obtained a seat and a voice in parliament, and in this way made their support essential to the existence of every government, the Crown, so long indifferent to the details of municipal arrangements, found sufficient motives for endeavouring to form close ruling bodies, irresponsible to the general community, and thus obtain the appointment of the representatives. But this policy was not generally adopted

till after the Reformation, although indications of it are to be found in several charters of Henry VII.; as in one to Bristol, in 1499, establishing a self-elective council of aldermen. The great instruments of the Crown in influencing the *composition* of the popular branch of the legislature were at first the *sheriffs* of the several counties returning members, of which, in the time of Edward I., there were thirty-seven; Durham and Cheshire having then palatinate parliaments of their own, and Monmouthshire being part of Wales, which was not yet legislatively incorporated with England, nor even effectively subjected to the English Crown. For as the writ addressed to these officers specified no particular city or borough, but required them in general terms "to cause to be elected two "citizens for each city, and two burgesses for each borough" in their bailiwick, a discretionary power of determining what towns were qualified to send representatives seems to have rested with them. This power they no doubt exercised in accordance with their instructions, as we may gather from several statutes[v] evidently passed to restrain, if possible, the indirect influence which the Crown thus obtained in the election of the House of Commons. So sensible, indeed, did the Commons become of the existence of this mode of undermining their independence, that, in the legislative incorporation of Wales and Cheshire with England, a new principle was introduced, that of determining by parliamentary enactment what towns within a particular territory should elect representatives, and what number they should elect. This principle did not extend to England, where the prescriptive discretional powers of the sheriffs continued to be exercised in accordance with the royal wishes.'

'It was necessary, however, to use a discretion. The omission of any of the towns which in public estimation had a prescriptive right to be represented, would have been too open an attack on the freedom of parliament. The calling of this right into action in boroughs wherein it had been dormant, or had fallen into disuse, was a more plausible course of proceeding; and, notwithstanding the evident partiality with which it was conducted, was permitted to pass without legislative interference. Accordingly, in the reigns of

[v] 5 Rich. II.; 7 Hen. IV. c. 15; 8 Hen. VI. c. 7; 10 Hen. VI. c. 2; 23 Hen. VI. c. 14.

Edward VI., Mary, and Elizabeth, besides seventeen boroughs *restored* to parliamentary existence, forty-six now first began to send members, making altogether an addition to the former representation of sixty-three places returning 123 members.'

Governing charters.

'Not content with this indirect nomination of the representatives, the Crown at this period assumed a new right, that of remoulding the municipal constitutions of the boroughs, by granting *governing charters*, which vested the local government, and sometimes the immediate election of the parliamentary representatives, in small councils, originally nominated by the Crown, to be ever after self-elected. The success of this attempt encouraged succeeding sovereigns not only to continue the system of erecting close boroughs, but to make a second and a bolder advance in the same direction, by attacking the constitutions of the prescriptively parliamentary municipalities themselves.'

'Already, in Michaelmas term, 40 & 41 Eliz., the judges had given an extrajudicial opinion, extremely favourable to the prosecution of this object. Attempts having been made to have popular elections of the principal officers of several boroughs, in opposition to the custom of leaving the elections in the hands of the common councils, a question was raised whether such elections were legal. On the application of the Privy Council, the judges determined that such custom was good, because the several boroughs had power to make by-laws; and where no by-law was to be found, it might nevertheless be presumed to have existed, because such custom must have originated in common consent. Elections of municipal officers by common councils were thus not only declared to be legal, but, where such customs had grown up, the community at large was for ever excluded from the elections.[w] This dictum of the judges was followed in 12 Jac. I. by the case of the new borough of *Dungannon* in Ireland;[x] in which it was held that the king could vest in a corporation the right of sending burgesses to parliament, and at the same time *restrain the exercise of that right to the select classes.* Such was thenceforth the form of all the corporations which were created or remodelled under James I. and Charles I.; a total addition to the borough representation of forty-one

[w] The *Case of the Corporations*, 4 Rep. 77a.

[x] 12 Rep. 120.

members, besides the four members for the two universities, having been effected in the reign of these two sovereigns.'

'I shall not, in this place, attempt any explanation of the legal proceedings by *quo warranto*, revived on so extensive a scale during the reigns of Charles II. and James II., which led to the forfeiture of its franchises by the city of London, and to the surrender of their charters by many of the other municipal corporations of the kingdom. It is somewhat remarkable, however, that while the successive governments which have held office since the Revolution have abstained from open interference with the liberties of the corporations, the charters which have been granted since that epoch are framed on the model of those of the preceding era. The patents of George III. do not differ in this respect from those granted in the worst period of the history of the boroughs.'[y]

'The perversion of our municipal institutions to political ends, the sacrifice of local interests to party purposes, frequently pursued through the corruption and demoralization of the electoral bodies, the alienation of corporate property, and the other flagrant abuses[z] flowing from the whole powers of the municipal corporations being vested in "select bodies," had for more than two centuries been a matter of constant and nearly universal complaint, before a remedy was applied by the statute 4 & 5 Will. IV. c. 76, commonly called "The Municipal Corporations Reform Act," the general effect of which, as amended by several subsequent statutes, I shall now proceed to explain.'

'The objects of municipal government have been usually confined to the appointment and superintendence of the police, the administration of justice both civil and criminal, the lighting and paving of the town, and in a few cases, the management of the poor. The statute 4 & 5 Will. IV. c. 76, did not attempt to extend the number of useful public objects which might be placed under municipal management. It was directed solely to the improvement of the means by which the objects of the old corporations were thereafter to be attained. And the first section of the Act in repealing so much of all laws, usages, charters, grants, and letters patent, — Objects of municipal government.

[y] Report of the Commissioners on the Municipal Corporations, 1835.

[z] Report of the Commissioners on the Municipal Corporations, *prope finem*.

as were inconsistent with the general provisions of the statute, left untouched the whole of those local laws which relate merely to the objects of municipal government. But the statute has rendered the functionaries of the municipalities eligible by, and responsible to, the persons whose interests they are appointed to protect; and created a constituency, which ought, in ordinary cases, to include all those who are interested in the proper performance of their public duties by the municipal officers.'

Burgesses.

'The constituents of the old corporations were known by the name of the *freemen;* and were usually admitted by the ruling body, which was in turn to be elected by the freemen. The freedom was obtainable by birth, or by marriage with the daughter or widow of a freeman, or by servitude or apprenticeship. In London, Shrewsbury, and other towns, a previous admission into certain guilds or trading companies was required in addition, which admission was procured by purchase. The rights of freedom, or burgess-ship, being privileges confined to few persons, were in many cases of considerable value to the possessor, particularly when they conferred a title to the enjoyment of the funds derivable from corporation property or of exemption from tolls or other duties, and they were often obtained by considerable sacrifices. The rights of the freemen *in esse* were consequently preserved by the statute, which at the same time enacted that no freedom should thenceforth be acquired by gift or purchase. The constituency which the statute provided for the reformed corporations (for the title of freemen is no longer applicable) consists of every person of full age, who shall have occupied premises within the borough for three previous years, and been also resident within seven miles of the borough, and rated in respect of such premises to the relief of the poor. Provision is made for the registration of the burgesses by the overseers of their respective parishes, for the correction and publication of the burgess-lists by the town-clerk, and for the revision of such lists by the mayor and assessors in the same manner as the lists of parliamentary electors.'

Abolition of exclusive trading.

'Except the right of electing its officers, the constituency has none of those exclusive privileges which were formerly enjoyed by the freemen. One of the most pernicious of these

was that of exclusive trading within the limits of the municipality; this was abolished in all the boroughs, but it is still enforceable in London, which, as already stated, was excepted from the operation of this Act. The mayor and aldermen, with the constituency, complete the body of the corporation; all the reformed municipalities being now styled "the mayor, aldermen, and burgesses" of the borough. The councillors, who are collectively called "the council," are the persons from whom the mayor and aldermen are chosen. Collectively the council is intrusted with the whole deliberative and administrative functions of the corporation, and appoints the town-clerk, treasurer, and other officers for carrying into execution the various powers and duties vested in them by the Act. The council is also charged with the performance of all the duties previously executed by the corporate bodies which they superseded. They select from their own body a watch committee; and this committee appoints a sufficient number of effective men to act as constables to preserve the peace by day and night.[a] The council may take on themselves the superintendence of the lighting of the borough, provided no local Act exists for the purpose.' The council.

'The council possesses the power, which we have seen is incident to all corporations, of making by-laws for the good rule and government of the borough, and the prevention and suppression of all such nuisances as are not punishable in a summary manner. These by-laws may be made enforceable by such fines, not exceeding 5*l.*, as may be thought sufficient for the prevention of offences against them. The exercise of this power of legislation must be by two-thirds at least of the council, and a delay of forty days must intervene, after a copy has been sent to one of the secretaries of state, before such by-laws can come into operation; the Crown having the power to disallow any by-law within that period.' By-laws.

'The council have the control of the borough fund,[b] any surplus in which, after payment of all necessary expenses and Borough fund.

[a] 'Justices of counties and the council of boroughs may agree to consolidate the county and borough police, 3 & 4 Vict. c. 88, s. 14, *et seq.* See now the stat. 19 & 20 Vict. c. 69. As to watch rates, see the stat. 2 & 3 Vict. c. 28; 3 & 4 Vict. c. 28.'

[b] 6 & 7 Will. IV. c. 104.

just demands, is to be applied for the benefit of the inhabitants and improvement of the borough. If the fund be insufficient, a borough rate may be levied. The council may grant leases of land for building purposes; but to prevent the partial and fraudulent transactions common in the old corporations, these powers are subject to very considerable restrictions. Other subsidiary and occasional powers are vested in the council, which is thus seen to be effectually the governing body of the corporation.'

Auditing and publication of accounts.

'These various powers of the council comprise nearly the whole of the strictly municipal powers affected by the Act. It is necessary to mention, however, one most important check on the exercise of their powers over the funds of the corporation, viz., the periodical audit of the accounts of the borough, and their subsequent publication. The frauds by the officers of the old corporations, the division of the funds for the interest of the governing body, their application to the corruption of the freemen in every shape in which money could be applied, formed the chief heads of accusation against those bodies. The uncontrolled disposition of funds by the new councils might eventually lead to similar abuses. The statute, therefore, provides for the appointment of *auditors*, persons qualified to be councillors, but not actually of that body, lest identity of interest might lead to partiality in the exercise of their functions. The accounts are to be audited half-yearly, and the treasurer is to make out and print a full abstract of the accounts for the year, a copy of which is obtainable by all the rate-payers.'

Councillors.

'No person is eligible as a councillor unless entitled to be on the burgess-list, nor unless seised or possessed of real or personal estate to an amount varying according to the population of the borough; and no minister of religion is capable of being elected a councillor. One-third of the body is elected annually on the 1st of November, when one-third of the members, those longest in office, go out. The *mayor* is elected from the councillors, and when elected must serve, or pay a fine of 100*l.* He presides at the meetings of the

Mayor.

[c] See the several statutes 7 Will. IV. & 1 Vict. c. 81; 12 & 13 Vict. c. 65; 13 & 14 Vict. c. 101, s. 10; and 15 & 16 Vict. c. 81.

council, and has precedence in all places within the borough, but he has few other exclusive functions or privileges. He also presides with the assessors at the election of councillors, and during his continuance in office is a justice of peace for the borough, and continues such for the succeeding year.[d] In boroughs returning members to parliament he is the returning officer. The *aldermen* seem to be little more than councillors having a title of precedence. They are elected by the council itself from the councillors, and consist of one-third of the number of councillors. They cannot be elected coroner or recorder, and are exempted from serving on juries. They hold office six years, one-half going out every three years. The duties of the *town-clerk* are to preserve minutes of the transactions of the council, and to make out and publish the "Burgess List" and "Ward Lists." He is responsible for the safe keeping of all charters, deeds, and records; is subjected to various fines in case of neglect of duty; and is disqualified from acting as auditor.[e] A *treasurer* must be appointed by the council, of which he cannot be a member, who is to give security for the discharge of his duties, and to keep accounts of all receipts and disbursements, to be open to the inspection of the aldermen and councillors. He is to pay no money except by order, in writing, of the council, and is to submit his accounts with vouchers half-yearly to the *auditors*, two in number, elected by the burgesses annually, on the 1st of March, from the persons qualified to be councillors.'

Aldermen.

Town-clerk.

Treasurer.

'The most important alterations made by the statute 4 & 5 Will. IV. c. 76, are those which relate to the *administration of justice*. In certain boroughs the Crown is empowered to appoint as many persons as may be thought proper to be *justices of the peace*, who are not required to have any qualification by estate. When a commission of the peace is granted to a borough, the council provide the requisite police officers; but the justices themselves may appoint their own clerk.'

Justices of the peace.

'The council have power also, if they think it necessary, that one or more *salaried police magistrates* should be ap-

Police magistrates.

[d] 'He may be, and now often is, re-elected.—See the stat. 3 & 4 Vict. c. 47.'

[e] As to his duties with respect to annual statements of the expenditure on highways, see the statute 12 & 13 Vict. c. 35, s. 2.

pointed for the borough, to fix the salary to be paid, and thereupon the Crown may appoint such magistrates. The appointment is given to the Crown, in order that the administration of justice may be above the suspicion of being tainted by party or local interests, a suspicion which might be incurred were the appointment made by the council. On compliance with certain preliminaries as to the gaol and the salary of the judge, the council may also, on petition, obtain from the Crown a grant of a separate court of quarter sessions; for which the Crown appoints a recorder, who is the sole judge of the court; and may either act as judge of, or appoint a judge for, the civil court of the borough, whose salary is to be fixed and paid by the council. The appointment of clerk of the peace, it may be added, is vested in the council.'

Courts of quarter session.

'These parliamentary corporations, it will be observed, possess some peculiar powers, and are subject, on the other hand, to some peculiar restrictions not applicable to corporations in general. In the third volume of these Commentaries I shall have an opportunity of explaining the proceedings by which the right to municipal offices is ascertained and asserted.'

III. Trading Corporations.

III. 'I have reserved for separate consideration that class of corporations which consists of individuals associated together for the purposes of trade or business, and with a view to individual profit. Besides this last distinctive mark, which is not to be found in any of those corporate bodies, the nature of which has been already explained, those I am now to treat of possess other peculiarities equally deserving of notice.'

'The system of association to which I allude, and which has received such gigantic development in modern times, is by no means of recent origin. Institutions founded on the same principle as the trading gilds of the middle ages seem to have existed among the Saxons; though the particulars relating to such associations, which have come down to us, are so extremely scanty, that we can form no precise idea of their object. We can only conjecture, that at that early period it must have been mutual aid and defence against the violence and encroachments of princes or marauding adventurers rather

than the increase of profits by means of conjoint enterprise or united capital.'

Soon after the Conquest, we find *gilds* of different trades established in the various sea-ports and other towns of importance in the kingdom. These fraternities generally became in course of time chartered corporations; each possessing its common hall, making by-laws for the regulation of its particular trade, and disposing of its common property. What constituted the bond of union was the exclusive privilege possessed by its members of following the particular occupation, which the company professed to protect. In this position these communities seem to have continued till about the time of the Reformation; when they mostly became merged in the municipal corporations, the franchises of which could in many cases be enjoyed by those only, who were *free* of one or other of the companies into which the communities was divided. For these companies, as they were generally termed after the Norman era, having contrived to obtain from the Crown not only exclusive privileges of trading, but also exemptions from tolls and dues to which merchants generally were subject, it was a matter of great importance to a trader to belong to one of them; in most cases, indeed, it was impossible for him to carry on business at all, without being entitled by such membership to enjoy the franchises thereby obtained.' Guilds.

'It is somewhat curious at the present day to contemplate the state of trade even in times of such comparative enlightenment and activity as those of the three Edwards. Every transaction was the subject of strict regulation; the extreme jealousy which prevailed between the different trading communities not only affording abundant pretext for the imposition of restrictions by the ruling powers, but necessitating a constant change in the measures adopted towards each of them separately. Of this capricious legislation the foreign merchants, notwithstanding the express declaration of the Great Charter, seem to have been the principal objects;[f]

[f] 'Thus in 1275 the foreign merchants were ordered by Edward I. to sell all their goods within forty days of their arrival, and their residence in England was forbidden, except by the special licence of the king. In 1303 the same monarch granted a charter, permitting foreign merchants to come safely to all the dominions of the Crown with all kinds of merchandize.'

and, as a natural consequence, early formed themselves into compact bodies, with a distinct locality and existence, precisely as is the case with our traders at the present day in the ports of China, or the Dutch in the harbours of Japan. In 1220 the merchants of Cologne had a hall in London, afterwards known as the *Gildhalla Teutonicorum*, or general company of Germans, called also the merchants of the Hanse, a fraternity which in the fifteenth century became the company of the *Steelyard*, that being the name of a tenement granted to them by authority of parliament in the fourteenth year of Edward IV. "Steelyard wares" long continued to be a general expression for the class of goods imported by this company, of as wide a signification comparatively as "Manchester wares" at the present day. In 1505 a rival company, called the "Merchant adventurers of England, for trading "in woollen cloths to the Netherlands," obtained a charter of incorporation,[g] prohibiting the merchants of the Steelyard from interfering with their new rivals. Violent disputes raged between these fraternities, and the company of the Steelyard seems to have gradually declined.[h] In the sixteenth century the discoveries of the Portuguese and Spaniards roused the spirit of mercantile adventure among the English, and joint-stock companies sprung up, whose first object was to obtain a charter, giving the adventurers the exclusive right of enjoying the advantages to be derived from the discovery of new countries or the opening of fresh sources of trade. Thus in 1553 some merchants of London, together with several noblemen, established a company under the title of the "Merchant "adventurers for the discovery of lands, countries, isles, &c., "not before known by the English." This adventure re-

[g] 'The existence of this association can be traced to the end of the thirteenth century; it originated in an association of English merchants for trading in foreign parts, called the Brotherhood of St. Thomas of Canterbury, a title which may seem somewhat curious at the present day. It must be recollected, however, that until 1344 the Cistercian monks, taking advantage of the exemption of ecclesiastics from customs' duties, were the greatest wool merchants in the kingdom. In that year ecclesiastical persons were prohibited by parliament from being engaged in any kind of commerce.'

[h] 'The merchant adventurers traded largely with the Low Countries, having for this purpose a large establishment at Antwerp. In the reign of Elizabeth their annual shipments of cloths were of the value of 800,000*l*. The Company entertained the Emperor Charles V. on his triumphal entry into Antwerp in 1520.'

sulted in the establishment of a trade with Russia. The company subsequently obtained several Acts of Parliament, and still elects its officers. Twenty years later the *Turkey Company* obtained a charter, giving them a monopoly of the English trade with the Ottoman Empire. This association ceased to exist in 1825. An *African Company* was formed as early as 1530, the trade at first being open. The *Eastland Company*, consisting of merchants trading to the ports of the Baltic, was incorporated in 1579, with a view of encouraging an opposition to the Hanse merchants. The origin of the East India Company I have already had occasion to explain. Of all these old trading associations the *Hudson's Bay Company*, incorporated in 1670, alone remains on its ancient footing.'

'Soon after the Revolution, the principle of association began to be applied to a variety of purposes besides those of foreign adventure and trade. Numerous projects were started, the execution of which could not be compassed by private means, but which it was thought might be attained by raising capital on the joint-stock principle. Hence arose, in the early part of the eighteenth century, the speculative mania, the frauds and panics, which are remembered in connection with the famous *South Sea Company*; and of which we have seen the counterparts more than once in our own times. To meet the evils occasioned by this novel development of the associative tendency, the famous "Bubble Act," 6 Geo. I. c. 18, was passed,[i] declaring all companies which presumed to act as corporate bodies[j] and to raise or pretend to raise transferable stock, public nuisances, and the promoters of them punishable accordingly. This statute was directed not so much against the theoretical offence of acting as a corporation without legal authority, as with a view to prevent the frauds of unprincipled adventurers, who proposed schemes merely as baits to extract money out of the pockets of the thoughtless. Such an object, however, is not to be effected by mere legislation; the gambling in stocks and shares which seems to be periodically revived among us, and which, in 1719, produced the "Bubble

Bubble Act.

[i] 'This Act was repealed by the statute 6 Geo. IV. c. 91.'

[j] 'There seems to be no doubt that "acting, or presuming to act as a corporate body," being a usurpation of a royal franchise, is an offence at common law. *Dutergier* v. *Fellowes*, 5 Bing. 267.'

Act," come to an end during the crash following inevitably the wild speculation which led to the statute; but the Act, nevertheless, had some effect in restraining for the future projects of a similar character to those against which its provisions were directed.'

'During the last century a large number of useful public undertakings, such as the making of canals, bridges, harbours, docks, and the like, have been carried into effect by companies formed on the joint-stock principle, and incorporated by Acts of Parliament; and more recently our gigantic system of intercommunication by railway has been obtained in a similar way. In these undertakings, the assistance of the legislature was necessary, not so much to give a corporate existence to the association of capitalists who joined in the scheme, for this might have been obtained by a royal charter, as to enable the company to carry out the project for which it was formed, by the compulsory purchasing of property necessary for the purpose, and to make by-laws binding on the public for protecting the rights and interests of the corporation. These companies, like the old trading associations of an earlier period which have been referred to, partake of the peculiar advantages derived from incorporation; advantages in which mere associations of individuals joined together to promote such common objects cannot possibly participate. A mere assemblage of adventurers cannot, for instance, by any agreement among themselves, sue or be sued in the name of any one of their body, or of any officer they may select for the purpose; they are liable, on the contrary, to the same laws as ordinary partnerships, and each individual is responsible to his last shilling for the acts and omissions, the contracts and debts, of the body generally. To facilitate the operations of such associations, many of which have been framed in recent times with the most laudable objects under the name of joint-stock companies, various statutes have been passed; but owing to the fluctuation in opinion regarding the true policy to be pursued towards such associations, the legislation relating to them has not been altogether consistent.'

'The original mode of forming a joint-stock company was by means of a deed of settlement, which constituted trustees of the partnership property, directors of the partnership affairs, auditors of its accounts and other officers, defined the

number of shares into which the capital was divided, and the form and mode of transferring them, and laid down rules for periodical meetings of the shareholders. In the absence of legislative interference, the rights and liabilities of the members of such bodies, in relation to the public, were the same as those of other members of ordinary partnerships; their rights and liabilities *inter se* depended on the provisions of the deed of settlement. The difficulties which were soon found to arise, in carrying on the business of such undertakings, induced the earlier joint-stock companies to obtain private Acts of Parliament, which usually enabled the company to sue and be sued in the name of the secretary or some public officer appointed for the purpose, and almost invariably concluded with a proviso that nothing therein should tend to *incorporate* the partnership; for one effect of incorporation would have been to destroy the individual responsibility of the members for the acts of the association, which the Legislature until quite recently most carefully retained. As joint-stock companies, however, increased in number and in usefulness, the cost and trouble necessary to obtain a private Act of Parliament were felt to be extremely burdensome; and the attention of Parliament being called to the subject, it was thought expedient by the Legislature to empower the Crown, to grant to joint-stock companies such powers as were likely to be most useful to them, without, however, conferring all the incidents of a corporation. The first attempt at legislation in this direction was not a very happy one. The statute 6 Geo. IV. c. 91, enabled the Crown, in any charter of incorporation thereafter to be granted, to provide that the members should be individually liable for the debts, contracts, and engagements of the corporation. This Act proved almost inoperative; and subsequently another mode of proceeding was tried by the statute 4 & 5 Will. IV. c. 94, which enabled the Crown by letters patent to grant to joint-stock companies the privilege of bringing or defending actions in the name of any of their officers. This Act does not seem to have been of much greater use than its predecessor, and accordingly it was repealed, and another attempt made in the same direction by the statute 7 Will. IV. and 1 Vict. c. 73. Though this Act seems to have been more calculated to meet the public exigencies than those preceding it, very few applications were

made for charters under its provisions; and at length the statute 7 & 8 Vict. c. 110 was passed, for the registration, incorporation, and regulation of all future joint-stock companies not requiring nor obtaining a charter or Act of Parliament. This statute introduced a system of public *registration*, by which the company became *incorporated*, for the purpose of carrying on the business for which it was formed, according to the provisions of its deed of settlement; but every shareholder remained liable individually for the debts and contracts of the company, and might be proceeded against as though he were not a member of the corporation. Companies formed for the purpose of carrying on the business of bankers were excepted from the operation of this statute, the Act 7 & 8 Vict. c. 113 being passed at the same session of Parliament for their special regulation.'

Registered joint-stock companies.

'A great many joint-stock companies were formed, and by registration obtained the corporate privileges, which they were enabled to do under the provisions of the statute 7 & 8 Vict. c. 110. It was not long, however, before the affairs of several became involved; and the difficulties which then presented themselves in attempting an adjustment of the rights and liabilities of the shareholders led to the celebrated Winding-up Acts, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108, which for several years exercised the acumen of the judges of the Court of Chancery, in a series of hopeless attempts to interpret and follow out their provisions. The effect of the flood of litigation carried on under these Acts was to throw a very strong light upon the principles of legislation applicable to joint-stock companies, and the knowledge was purchased at an enormous expense, which has recently led to the repeal of the Registration and Winding-up Acts, and to a total remodelling of the law regarding joint-stock companies. This has been effected by the statute 19 & 20 Vict. c. 47, which provided for the re-registration under its provisions of all companies previously registered under the statute 7 & 8 Vict. c. 110.'

Limited liability.

'The principle of limited liability, or the restriction of the responsibility of each member to the amount of the capital subscribed by him, which had long been conceded to companies incorporated by Act of Parliament, without baneful effects to the commonwealth, has been at length extended

by the same statute, 19 & 20 Vict. c. 47, to all joint-stock companies coming within the operation of the Act, which choose to adopt its provisions, on the simple condition of obtaining registration and conforming to a few simple rules, whereby the personality of the company is defined. From its operation are excepted all companies established by Act of Parliament, royal charter, or letters patent, all banking or insurance companies, and associations engaged in mining in the Stannaries, where companies with a limited liability may be formed conformably to certain local customs, which are generally known as the Cost-Book System.' Cost-book system.

'I have thus cursorily traced the history of trading corporations from the earliest period of our history down to the present time. To sum up all, it appears that there now exist four classes of joint-stock companies, the result of that partial and progressive system of legislation which is characteristic of our national genius; and these, for the sake of clearness, I shall now proceed to describe in their order, viz.:'

1. Companies incorporated by Act of Parliament.

'1. Trading companies incorporated by special Acts of Parliament. This class includes railway, dock, harbour, and canal companies, a great many insurance companies, and a vast number of other bodies engaged in every species of profitable employment. Formerly each company thus incorporated was governed by the peculiar provisions of the Act which it obtained. These varied considerably, and hence uncertainty and confusion arose. In order, therefore, to introduce uniformity with respect to companies thus established, a general Act, applying to all companies to be thereafter incorporated by Act of Parliament, was passed under the title of "The Companies' Clauses Consolidation Act," 8 & 9 Vict. c. 16. This statute embodies all the clauses which had usually been inserted in special Acts of Parliament establishing public companies, and contains a complete code for the regulation of the proceedings, the transfer of the shares, and the general management of companies thus incorporated. Another Act, called "The Lands' Clauses Consolidation Act," 1845, was passed at the same time, consolidating all those provisions which it had previously been necessary to insert in the special Act of any company, which required powers of acquiring land compulsorily for the purposes of the undertaking.'

'The peculiar character of railway undertakings rendered a third Act necessary, specially applicable to them. This was "The Railways' Clauses Consolidation Act," 1845, which laid down regulations as to the construction of railway works, the amount and mode of enforcing the payment of tolls and fares, and the making of by-laws for the conduct of their business,[k] which are binding upon all persons whatsoever. Besides this general Act, which applies only to railway companies established after its passing, there are various other statutes connected with the general working of railways by which certain conditions are attached to their construction and working,[l] and their traffic regulated,[m] and general controlling powers vested in the Board of Trade.[n] Other Acts provide for their being wound up,[o] and facilitate their abandonment.'[p]

2. Chartered companies. 2. 'A second class of joint-stock companies are those established under the statute 1 Vict. c. 73, or the preceding Act 6 Geo. IV. c. 91, which have been already referred to. Very few companies of this class exist, the powers which may be conferred under these statutes, as I have before remarked, not having been found to meet the exigencies of public enterprise.'

3. Banking companies. 3. 'Banking companies formed since 1844 form a distinct class, being regulated, as we have already seen, by the statute 7 & 8 Vict. c. 113, which requires all companies formed for the purpose of carrying on the business of bankers, of more than six partners, to obtain letters patent; which must contain the provisions of the deed of partnership in a given form; by which the company is incorporated, without taking away the individual liability of the shareholders. Joint-stock banking companies may be made bankrupt, and are also amenable to the provisions of the Winding-up Acts.'[q]

4. Registered joint-stock companies. 4. The last class of trading corporations are the registered

[k] These by-laws must, however, not be repugnant to the provisions of the Acts affecting railways. See *Williams* v. *Great Western Railway Co.*, 10 Ex. 15.

[l] 7 & 8 Vict. c. 85.

[m] 17 & 18 Vict. c. 31.

[n] 14 & 15 Vict. c. 64.

[o] 9 & 10 Vict. c. 28.

[p] 13 & 14 Vict. c. 83.

[q] See vol. ii. p. 506.

joint-stock companies, which will in future be regulated by the Joint Stock Companies Act, 1856.[r] Under this statute "seven or more persons associated for any lawful purpose "may, by subscribing their names to a memorandum of "association, and otherwise complying with the requisitions "of the statute in respect of registration, form themselves "into an incorporated company, with or without limited "liability."

This registration is obtained by delivering to the registrar of joint-stock companies a memorandum of association, stating the name, place of business, objects, amount of capital, and liability of the members of the company, and certain articles of association in a prescribed form. Upon registration being effected, the subscribers of the memorandum of association, together with such other persons as from time to time are admitted to be shareholders in the company, become a body corporate by the name prescribed in the memorandum of association, having a perpetual succession and a common seal, and power to hold lands to a certain extent, and with consent of the Board of Trade to any extent whatever.' How formed.

'The company may hold itself forth to the public as one of which the members are liable either with or without limit, according as the founders of it choose to adopt the principle of limited liability or not. Where the liability of the shareholders is limited by the memorandum of association, the word "limited" must be the last in the registered title of the company, and must be inseparably attached to its name.'

'The statute requires, under penalties for disobedience, that a register of shareholders shall be kept, with particulars of their shares, and the amount paid on them; and that this list be annually revised, and a copy furnished to the registrar of joint-stock companies. This copy is open to public inspection, so that all the particulars of importance respecting Register of shareholders.

[r] A company, consisting of more than twenty persons, cannot carry on in partnership any trade or business having gain for its object, unless they are registered as a company under this Act, or are authorized by a private Act of Parliament, or by charter or letters patent, or are engaged in working mines in the Stannaries. If any persons carrying on business in partnership contrary to this provision, every person so acting is severally liable for the payment of the whole debts of the partnership, and may be sued for the same without the joinder in the action or suit of any other members of the partnership.' (Joint-Stock Companies Act, 1856, s. 4.)

the constitution of the company can be at any time ascertained by persons dealing with it. The statute prescribes minutely what contracts of the company shall be under its common seal, and in what contracts it may be bound by the acts of any person acting under its authority. Its local habitation is the "registered office," to which it is required to fix its name conspicuously painted or engraven, and to this place all communications to the company must be addressed.'

Inspection by Board of Trade.

'The affairs of a registered company are liable to examination by inspectors appointed by the Board of Trade, upon the application of one-fifth in number and value of the shareholders; and the statute contains a complete code of regulations for winding up a company unable to meet its engagements, or which it is thought desirable to wind up for other reasons. Upon a company formed with limited liability being wound up, no contribution can be required from any shareholder beyond the amount (if any) remaining unpaid on the shares held by him; a person who has ceased to be a holder of shares within *one year* prior to the commencement of the winding-up proceedings is, however, deemed an existing shareholder. In the winding up of other joint-stock companies, any person who has ceased to be a shareholder within *three years* is to be deemed an existing shareholder; but is not liable in respect of any debts contracted *after* he ceased to be a shareholder. Directors, who declare a dividend when the company is insolvent are jointly and severally liable to the extent of the dividend for all the debts of the company; and every person concurring or carrying on the business of the company when the number of the partners is less than seven, is severally liable for its debts.'

How dissolved.

'This species of corporation may be dissolved by being wound up either voluntarily or compulsorily. A voluntary winding up may take place: 1. Whenever the period, if any, fixed for the duration of the company expires, or the event, if any, occurs upon which it is to be dissolved: 2. Whenever the company has passed a special resolution requiring its winding up.'

Winding-up.

'A company may be wound up compulsorily: 1. By virtue of a special resolution to that effect: 2. Whenever it does not commence business within a year of its incorporation, or

suspends business for a year: 3. Whenever the shareholders are less than seven in number: 4. Whenever the company is unable to pay its debts: or 5, Whenever three-fourths of the capital have been lost or become unavailable.'

'A company is to be deemed unable to pay its debts; 1. Whenever a creditor for 50*l.* has served a demand of payment, and the company has for three weeks neglected to pay the claim, or to secure or compound for it to the satisfaction of the creditor; and 2, Whenever an execution is returned unsatisfied, in whole or in part.'

'The proceedings on the winding-up of a joint-stock company take place either in the Court of Chancery or the Court of Bankruptcy, as shall be pointed out in the second volume of these Commentaries.'

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